Supreme Court, U.S.
FILED

981462 MAR 15 1999

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1998

Charles Edward Sweeney, Jr.,
Petitioner

versus

State of Indiana,
Respondent

On Petition for a Writ of Certiorari
To the Supreme Court of Indiana

PETITION FOR A WRIT OF CERTIORARI

BURTON MILWARD, JR.
Attorney at Law
332 Duke Road
Lexington, Kentucky 40502
(606) 269-2001
Counsel of Record

David E. Mosley
Of Counsel

Attorneys for Petitioner
CHARLES EDWARD SWEENEY, JR.

---

97 88

QUESTIONS PRESENTED

1. Whether state authorities may hide behind a federal plea agreement debriefing to conduct an in-custody interrogation of the federal defendant regarding a separate state offense without advising the defendant-suspect that his statements can be used against him, contrary to this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), in violation of his Fifth Amendment privilege against self-incrimination?

2. Whether a suspect's statement can be knowing and voluntary, where it was induced by the suspect's own attorneys' unequivocal, but incorrect, assurances that the state prosecuting attorney had agreed to provide use immunity so that whatever the suspect said concerning a state murder investigation could not be used against him, which agreement had not in fact been reached, contrary to this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Shotwell Manufacturing Company v. United States*, 371 U.S. 341 (1963)?

3. Whether Petitioner Sweeney was denied the effective assistance of counsel under the Fifth and Sixth Amendments when his attorneys assured him that the Clark County prosecuting attorney had agreed to provide use immunity for Petitioner Sweeney's statements regarding the Guthrie homicide, when in fact no such use immunity agreement had been agreed upon by the Clark County prosecuting attorney, and Petitioner Sweeney's statements made in reliance upon his attorneys' assurances were subsequently used against him as a basis for his indictment and conviction of murder, contrary to this Court's holdings in *Miranda v. Arizona*, 384 U.S. 436

(1966), *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Davis v. United States*, 512 U.S. 452 (1994)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 19

I. Certiorari should be granted to determine whether state authorities may hide behind a federal plea agreement debriefing to conduct an in-custody interrogation of the federal defendant regarding a separate state offense without advising the defendant-suspect that his statements can be used against him, contrary to this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), in violation of his Fifth Amendment privilege against self-incrimination 19

II. Certiorari should be granted to determine whether a suspect's statement can be knowing and voluntary, where it was induced by the suspect's own attorneys' unequivocal, but incorrect, assurances that the state prosecuting attorney had agreed to provide use immunity so that whatever the suspect said concerning a state murder investigation could not be used against him, which agreement had not in fact been reached, contrary to this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Shotwell Manufacturing Company v. United States*, 371 U.S. 341 (1963).....21

III. Certiorari should be granted to determine whether Petitioner Sweeney was denied the effective assistance of counsel under the Fifth and Sixth Amendments when his attorneys assured him that the Clark County prosecuting attorney had agreed to provide use immunity for Petitioner Sweeney's statements regarding the Guthrie homicide, when in fact no such use immunity agreement had been agreed upon by the Clark County prosecuting attorney, and Petitioner Sweeney's statements made in reliance upon his attorneys' assurances were subsequently used against him as a basis for his indictment and conviction of murder, contrary to this Court's holdings in *Miranda v. Arizona*, 384 U.S. 436

(1966), *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Davis v. United States*, 512 U.S. 452 (1994).. 26

CONCLUSION. 29

APPENDIX

Appendix A (Opinion of the Indiana Supreme Court, December 18, 1998) 1a-57a

Appendix B (Ruling of the Clark County, Indiana, Circuit Court, from the Bench, November 10, 1994; And Reiterated, November 22, 1994). **1b-3b**

TABLE OF AUTHORITIES

Cases: **Page**

Davis v. United States,
512 U.S. 452 (1994). 26, 27-28

Edwards v. Arizona,
451 U.S. 477 (1981) 26, 28

Hutto v. Ross,
429 U.S. 28 (1976) 25

Malloy v. Hogan,
378 U.S. 1 (1964). 22, 25

Miranda v. Arizona,
384 U.S. 436 (1966) . . . . . *passim*

Shotwell Manufacturing Company v. United States,
371 U.S. 341 (1963) 22, 24-25

Strickland v. Washington,
466 U.S. 668 (1984). 27

Sweeney v. State, Ind.,
704 N.E.2d 86 (1998) 1, 14

Constitutional Provisions: **Page**

Fifth Amendment,
United States Constitution . . . . . *passim*

Sixth Amendment,
United States Constitution 2, 17, 18, 26, 29

Statutes:

18 U.S.C. §924(c). 2

28 U.S.C.§1257, Jurisdiction. 1

OPINION BELOW

The opinion of the Supreme Court of Indiana is published in *Sweeney v. State*, Ind., 704 N.E.2d 86 (1998), and is set forth in the Appendix to this Petition at App. 1a-57a.

The findings of fact, conclusions of law and ruling of the Clark Circuit Court were made at the conclusion of a suppression hearing conducted on November 11, 1994, and reiterated at the conclusion of a supplemental suppression hearing conducted on November 22, 1994. Said findings, conclusions and ruling are set forth in the Appendix to this Petition at App. 1b-3b.

JURISDICTION OF THIS COURT

The Opinion of the Supreme Court of Indiana was entered on December 18, 1998. [Opinion, Appendix, p.1a-57a] This Court has jurisdiction to review the judgment of the Indiana Supreme Court pursuant to 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

> No person shall ... be compelled in any criminal case to be a witness against himself.

The Sixth Amendment to the United States Constitution provides in pertinent part as follows:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

In a jury trial held in November 1995, Petitioner Charles Sweeney was convicted of murder. [Judgment of Conviction, R. 486] The trial court imposed a sentence of sixty (60) years imprisonment. [Sentencing Order, R. 487-489]

The evidence upon which Petitioner Sweeney was convicted was obtained from Petitioner Sweeney "out of his own mouth." The facts and circumstances of the involuntary statement which the prosecution used to convict may be set forth as follows.

Petitioner Sweeney's statement regarding a state homicide was given in connection with a federal plea agreement on a federal charge of using a bomb in connection with a crime of violence, in violation of 18 U.S.C. §924(c). [Plea Agreement, R. 633, State's Exhibit 1; and Amended Plea Agreement, R. 643, State's Exhibit 3] Prior to giving any statement pursuant to the federal plea agreement, Petitioner Sweeney and his attorneys sought state use immunity for any statements he might make regarding the state homicide.

At all times during the two full days of interrogation, Petitioner was in custody. The fact of custody is not contested.

> The record reflects indisputable evidence that defendant was in federal custody. [Opinion, Appendix, p. 34a]

Interrogation during the two days was conducted by federal and state officers. During the first day, federal officers debriefed Petitioner Sweeney regarding the federal offense to which he was pleading guilty. During the second day, it is uncontested that a postal officer named Vance Arnold was present *as the representative of the State of Indiana* to conduct the interrogation regarding the long-unsolved state homicide investigation in which Petitioner Sweeney was a suspect.

> VANCE ARNOLD: I was asked to ... serve as a representative of the Clark County Police Department with respect to other information that Mr. Sweeney was going to provide including the location of the body of Danny Guthrie. [Vance Arnold, R. 688]

> VANCE ARNOLD: I was a representative of the Clark County Police Department with respect to recording the information being provided by Mr. Sweeney during this Federal debriefing. [Vance Arnold, R. 698]

> Q: [W]hen did you start your portion regarding the homicide investigation into the death of Danny Guthrie?

> VANCE ARNOLD: That was on June 30.
>
> Q: Okay, that would be the second day.
>
> VANCE ARNOLD: Yes. ... [I]t was the last information provided at the end of the two-day session. [Vance Arnold, R. 692]
>
> DETECTIVE HAROLD KRAMER: The second day I would say that most of the questions that were asked were asked by Inspector Vance Arnold.
>
> Q: Are you saying that the questions in connection to the whereabouts of Danny Guthrie's body were asked by Vance Arnold primarily?
>
> DETECTIVE HAROLD KRAMER: I'd say the majority were, yes, sir. [R. 1332]

It is further uncontested that Petitioner Sweeney was never informed that any statements he might make regarding the state homicide could be used against him, as required by this Court's decision in *Miranda* to protect his Fifth Amendment right against self-incrimination.

> The record reflects indisputable evidence that the defendant was in federal custody and indeed was not advised of his *Miranda* rights. [Opinion, Appendix, p. 34a]

The State of Indiana's representative at the two-day interrogation of Petitioner Sweeney confirmed that he had not

advised Petitioner Sweeney that his statement could be used against him. When asked if he or anyone else had given the *Miranda* warning to Petitioner Sweeney that day, Vance Arnold said, "No, I did not." [Vance Arnold, R. 697]

> Q: Did you hear anybody else in that room tell Mr. Sweeney that the statement he was giving in connection with Danny Guthrie could be used against him?
>
> VANCE ARNOLD: No. [Vance Arnold, R. 702]
>
> ***
>
> Q: Did you inform Mr. Sweeney prior to him making this statement that it would be and could be used against him?
>
> VANCE ARNOLD: No sir.
>
> Q: All right, so you didn't give him the *Miranda* rights that we hear so often on television for example?
>
> VANCE ARNOLD: That's correct. [Vance Arnold, R. 1609]

Prior to giving any statement pursuant to the federal plea agreement, Petitioner Sweeney and his attorneys sought state use immunity for any statements he might make regarding the state homicide. When his attorneys felt they had obtained use immunity regarding any state-

ments Petitioner Sweeney might make concerning the state homicide, they assured Petitioner Sweeney he would not be prosecuted based on any statements he made regarding that homicide.

Petitioner Sweeney's counsel Michael McDaniel, an attorney with 26-years experience in criminal defense work [Michael McDaniel, R. 601], contacted the state's prosecuting attorney Steven Stewart regarding use immunity for any statements concerning the Danny Guthrie homicide.

> MICHAEL McDANIEL: I contacted Mr. Stewart early in the morning by telephone. ... [W]e wanted use immunity in several areas ... wanted to obtain a use immunity on the Guthrie homicide. ... [O]n the issue of the Guthrie homicide, he indicated he would prosecute Mr. Sweeney if he was able to obtain independent information which would justify the prosecution. Now my understanding of that portion of the conversation would have been that we had the use immunity agreement. [Michael McDaniel, R. 606, 607, 608]

Petitioner Sweeney's counsel McDaniel assured Petitioner Sweeney about the effect of the use immunity agreement with the Clark County prosecuting attorney regarding statements concerning the Guthrie homicide.

> MICHAEL McDANIEL: [W]e would have met privately and confidentially with Mr. Sweeney. I would have advised him what

> the nature of the phone call would have been and that the fact that he had use immunity that anything he said concerning the Guthrie incident could not form the basis for prosecution against him and advised him that we did not have this in writing, but I had talked with the Prosecuting Attorney, it was clearly my understanding that's what the agreement was, and he accepted what Mr. Sedwick and I had to say as being the way the situation was that he did indeed have use immunity, and because he did, ... because of the use immunity he agreed to cooperate fully with the United States and with the Postal Inspector. [Michael McDaniel, R. 611-612]

Petitioner Sweeney's counsel McDaniel reassured Petitioner Sweeney that the use immunity agreement was "carved in stone."

> Q: [D]o you recall Mr. Sweeney asking you about the agreement you reached with Mr. Stewart, and him being informed that that agreement was "carved in stone?"
>
> MICHAEL McDANIEL: I think I can say I definitely said that. ... He [Mr. Sweeney] would have been advised that anything he said would not have been, would not be in the future used against him to generate a murder charge. Would have taken him, limiting our conversation to the homicide, that's exactly what he would have been told, and he would have been told too, it would

> be appropriate to give as complete of a statement as possible, because use immunity was in place and in effect in his case. [Michael McDaniel, R. 627-628]

Petitioner Sweeney's second defense attorney, Edwin Sedwick, has practiced law since 1972. [Edwin Sedwick Deposition, R. 669, p. 4] Sedwick outlined the use immunity agreement with the Clark County Prosecutor.

> EDWIN SEDWICK: [I]t was on the morning of June 30th, 1992. Mike McDaniel talked with Steve Stewart. ... And at that point in time, reached an agreement with the prosecutor pertaining to use immunity for Chuck Sweeney, as it relates to this Guthrie question. ... [T]he agreement was that there would not be any State prosecution over anything which might develop out of whatever statement Chuck Sweeney would give.... [Edwin Sedwick Deposition, R. 669, pp. 7-8]

Petitioner Sweeney's lawyers assured him the use immunity agreement was in place, and in reliance on their assurances, Petitioner Sweeney gave the statements concerning Danny Guthrie's body which subsequently were used against him to procure his conviction for murder.

> EDWIN SEDWICK: The terms of the agreement were related to Chuck Sweeney. ... There's no doubt in my mind that Chuck Sweeney, from his perspective, was -- had an understanding that he was being afforded

> use immunity -- immunity within the context of what's on my notes, before he gave the authorities any type of information dealing with Daniel Guthrie, or the whereabouts of his body. [Edwin Sedwick Deposition, R. 669, pp. 10, 26]

Thus, it is uncontested that Petitioner Sweeney's statements were made in light of the assurances of his own attorneys that use immunity had been promised in exchange for the statements.

Clark County Prosecutor Steven Stewart testified that he had never told defense counsel McDaniel that Petitioner Sweeney's statements would not be used against him.

> STEVEN STEWART: In neither of those conversations, did I tell Mr. McDaniel that his statements would not be used against him on the murder. [Steven Stewart, R. 672]

Petitioner Sweeney's Motion to Suppress Statement [R. 114-116] argued the statement was "involuntary" and should be suppressed because: 1) "Sweeney did not knowingly and voluntarily waive his Fifth Amendment right against self-incrimination prior to being interrogated"; 2) "Sweeney was not advised of his *Miranda* warnings prior to giving said statement so he was not informed that the statement would be used against him"; 3) "Sweeney gave the statement under the advice of his attorneys that the government could not use the statement and that he was not, therefore, incriminating himself"; and 4) the statement would be inadmissible in that

admission of same would constitute a violation of Sweeney's right to effective and competent representation -- "if Sweeney's counsel wrongly informed him his statement was protected when it was not, such acts would constitute the highest most grievous acts of ineffectiveness of counsel." [R. 114-116]

Parallel arguments also were raised in Petitioner Sweeney's Motion to Dismiss Information [R. 32-33], citing to both state and federal constitutions; Motion for Appointment of Special Prosecutor [R. 36-40]; and Memoranda in Support of Motion to Dismiss [R. 73-77].

On November 10, 1994, the trial court conducted a suppression hearing regarding the June 30, 1992 statement of Petitioner Sweeney concerning the Danny Guthrie homicide. The trial court denied the motion to suppress. Without filing written findings and conclusions, the trial court ruled from the bench at the conclusion of the hearing as follows, in pertinent part:

> THE COURT: I'm not about to handicap the State of Indiana for a misunderstanding, and I'm going to call it a misunderstanding, that Defense Counsel might have had in a very brief conversation with the Prosecuting Attorney. [R. 725-726; Appendix, p. 1b] I can see how there could be a misunderstanding and I'm calling it a misunderstanding but I don't have any evidence here before me today to indicate that the State of Indiana granted use immunity to ... Mr. Sweeney regarding information concerning the location

of the body of Mr. Guthrie. [R. 727-728; Appendix, p. 2b]

THE COURT: Now for Mr. Sweeney's situation it may be considered to be a gross misunderstanding. [R. 727; Appendix. pp. 1b-2b]

THE COURT: I'm not going to apply *Miranda*, at least to the extent that the Defense wants me to technically apply it. I know of no particular provisions in the Federal law or in State law that says you have to use those exact words before you're permitted to use an admission of a Defendant or a confession of a Defendant. The whole purpose of *Miranda* is to make certain that that individual is fully aware of his Constitutional Rights. ... That's one way of doing it, that's probably the clearest way of doing it, that's the acceptable way of doing it but in this particular case I had a Defense Counsel tell me that he went to extremes, and I think he used the word extremes or he certainly used the word great lengths in explaining to Mr. Guthrie [*sic*] what use immunity meant and what transactional immunity meant and this went on on several occasions, not just the date of the negotiations with the Feds, this was preceded a number of times and use immunity goes to the very heart and soul of giving statements against your interests and whether or not those statements can be used against you and Mr. Sweeney had two com-

> petent attorneys practicing around here for 27 odd years or whatever the amount of years were, underlying the bottom line here. Without hearing argument from either side, the Motion to Suppress the Statement is denied. [R. 729-731; Appendix, pp. 2b-3b]
>
> THE COURT: Without hearing argument from either side, the Motion to Suppress the Statement is denied. The Motion to Dismiss the Information is denied. [R. 731; Appendix, p. 3b]

The trial court's remarks denying Petitioner Sweeney's Motion to Suppress Statement [R. 725-731] are set forth in full in the Appendix to this petition, at App. pp. 1b-3b.

The trial court's ruling barely touched on the voluntariness or involuntariness of Petitioner Sweeney's statement, saying only that, from Petitioner Sweeney's viewpoint, "it may be considered to be a gross misunderstanding." [R. 727; Appendix, pp. 1b-2b] Rather, the trial court focused on the misunderstanding between defense counsel and the state's prosecuting attorney.

As the Indiana prosecuting attorney acknowledged at the beginning of the suppression hearing, the state would not have a case without Petitioner Sweeney's June 30, 1992 statement.

> WILLIAM GRIMES: I would advise the Court that we have previously stated that without the statement we probably could not proceed. [William Grimes, R. 596]

Indeed, the State of Indiana prosecuted the murder charge based exclusively on Petitioner Sweeney's statement and evidence developed directly from that statement.

The state's principal witness was the case detective Harold Kramer. Harold Kramer was employed by the Clark County Sheriff's Office. [R. 1246] Completely unknown to Petitioner Sweeney (although known to his attorneys), state case detective Harold Kramer listened to and viewed from a separate office the entire interrogation of Petitioner Sweeney regarding the Guthrie homicide. At trial, Detective Kramer gave lengthy evidence of the contents of Petitioner Sweeney's statement.

> DETECTIVE HAROLD KRAMER: I was in the office of the chief investigator who had a closed circuit monitor that provided security to various interview rooms and from that location I was able to observe the debriefing. [R. 706]

Kramer testified as to the extensive details of Petitioner Sweeney's statement, regarding Sweeney's contact with Danny Guthrie on May 28, 1991, their activities together, where they went and what they did, their fishing expedition, their involvement with marijuana plants, Sweeney's contact with Kim Guthrie on May 29, 1991, how Sweeney had located the body of Danny Guthrie and how Sweeney had buried Guthrie's body, how some unknown person or Guthrie himself had shot Guthrie in the head with a 9 millimeter handgun that Sweeney had loaned to Guthrie earlier on May 28, 1991, and how Sweeney had buried the gun in a can. **Sweeney's state-**

ment was clear that he, Sweeney, had not shot Guthrie but had discovered and buried Guthrie's body. Kramer testified that Sweeney provided a map "that was written and drawn by Chuck Sweeney at Indianapolis during the statement indicating the location of Danny Guthrie's body" [R. 1279, 1313] which was introduced.

Kramer testified that Sweeney had placed Guthrie's fishing gear near the door of Guthrie's residence. Kramer testified about Sweeney's explanation for previous inconsistent statements. Kramer testified that Sweeney "thought or he indicated that Danny was working for the police." [R. 1312]

Vance Arnold, who on behalf of the state prosecuting attorney conducted the interrogation of Petitioner Sweeney concerning the Danny Guthrie homicide, likewise testified at length about the details of Petitioner Sweeney's statement and the map Sweeney drew showing the location of Guthrie's body. [R. 1594-1607]

Based on Detective Kramer's recitation of the details of Petitioner Sweeney's statement and evidence developed directly from that statement, the prosecution obtained conviction of Petitioner Sweeney for the murder of Danny Guthrie. In other words, Petitioner Sweeney was convicted by words out of his own mouth.

The Indiana Supreme Court, in *Sweeney v. State*, Ind., 704 N.E.2d 86 (1998), addressed the voluntariness issue and made three separate holdings. [Opinion, Appendix, pp. 33a-41a]

First, the Indiana Supreme Court held that, although the record demonstrates Petitioner Sweeney was not advised of his *Miranda* rights, "an equivalent to the advisement of *Miranda* rights existed."

> The record reflects indisputable evidence that defendant was in federal custody and indeed was not advised of his *Miranda* rights. ... In this case, we believe that an equivalent to the advisement of *Miranda* rights existed. Defendant had two of his lawyers present when he provided the statements which he now wishes to suppress. Irrespective of the fact that the defense attorneys encouraged defendant to provide certain statements to federal authorities to solidify a plea agreement, certainly these defense attorneys advised defendant of his rights and protected defendant from being coerced by the State. Under these circumstances, we find no error in the State's failure to advise defendant of his *Miranda* rights. [Opinion, Appendix, pp. 34a-35a]

As Petitioner argues, *infra*, nobody ever advised Petitioner Sweeney that his statement could be used against him in a state murder prosecution. It is uncontested that Vance Arnold, the state's representative conducting the interrogation regarding the Guthrie homicide, never advised Petitioner Sweeney that his statement could be used against him, even though he knew Petitioner Sweeney was a suspect. Petitioner Sweeney's defense attorneys never advised him that his statement could be used against him; in fact, they advised him to tell every-

thing he knew, assuring him that he was protected by use immunity from the state prosecutor.

Second, the Indiana Supreme Court held that there "was a misunderstanding between the defense counsel and the State and that in fact no use immunity existed."

> Defendant next contends that ... the statements which defendant provided were inadmissible because they were made under the belief that the State had granted him use immunity. The trial court determined that there was a misunderstanding between the defense counsel and the State and that in fact no use immunity existed. We agree with the trial court's finding. ... We agree with the trial court's finding that the prosecutor's statements do not suggest that he was offering defendant use immunity. [Opinion, Appendix, pp. 35a-36a]

As Petitioner argues, *infra*, the court's conclusion that "there was a misunderstanding between the defense counsel and the State" sidesteps the issue. Petitioner Sweeney never communicated with the state prosecutor; only his attorneys communicated with the state prosecutor. There was no misunderstanding whatsoever between Petitioner Sweeney and his attorneys. They told him point blank he had use immunity regarding the Guthrie homicide, and that he should tell everything he knew. They told him the agreement was "carved in stone." "[I]t would be appropriate to give as complete of a statement as possible, because use immunity was in place and in effect in his case." [McDaniel, R. 628] Petitioner

Sweeney's statement was involuntary precisely because it was induced by this false assurance that use immunity was "in place and in effect in his case."

Third, the Indiana Supreme Court held Petitioner Sweeney was not denied the right to the effective assistance of counsel, because the right to counsel does not commence until "at or after the initiation of adversary judicial criminal proceedings," and Petitioner Sweeney had not been charged with the murder of Danny Guthrie at the time Petitioner Sweeney made the statements which formed the basis for the murder charge.

> Defendant finally contends that ... he was denied the effective assistance of counsel. ... Defendant's claim of ineffective assistance of counsel is based on the fact that his counsel failed to obtain a writing or recording of the grant of "use immunity." ... [W]e assume, without deciding, that counsel was deficient for failing to obtain an agreement in writing. ... In this case, although federal charges had been filed, the State had not yet filed charges for the murder of Guthrie. Consequently, defendant's Sixth Amendment right to counsel and, thus, his right to the effective assistance of counsel had not attached when he provided statements regarding the location of Guthrie's body. [Opinion, Appendix, pp. 38a-41a]

As Petitioner Sweeney argues, *infra*, it is not simply the failure of defense counsel to obtain immunity in writing which has rendered their representation at the June 30,

1992 interrogation such a farce and a mockery, but rather their advice to Petitioner Sweeney that use immunity is in place and he should tell everything he knows, in the teeth of their failure to obtain use immunity in writing, which caused him unknowingly and involuntarily to convict himself out of his own mouth. Whether characterized as Fifth Amendment ineffective assistance of counsel or Sixth Amendment ineffective assistance of counsel, Petitioner Sweeney's defense counsel failed utterly to protect his Fifth Amendment right against self-incrimination, resulting in his conviction for murder.

On appeal, Petitioner Sweeney placed the issue of his involuntary statement before the Indiana Supreme Court.

> The 5th Amendment to the United States Constitution provides, in part, that no person "shall be compelled in any criminal case to be a witness against himself." The 5th Amendment requirement is the same for the State and the Federal Government. The basic issue for any determination of admissibility of a statement is whether the statement is voluntarily given. [Brief of Appellant, p. 22]

The issue of whether Petitioner Sweeney voluntarily and knowingly gave up his Fifth Amendment protection against self-incrimination requires further review or supervision by this Court.

REASONS FOR GRANTING THE WRIT

I.

Certiorari should be granted to determine whether state authorities may hide behind a federal plea agreement debriefing to conduct an in-custody interrogation of the federal defendant regarding a separate state offense without advising the defendant-suspect that his statements can be used against him, contrary to this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), in violation of his Fifth Amendment privilege against self-incrimination.

As set forth in detail in the Statement of the Case, *supra*, in the course of a two-day plea agreement interrogation, in which federal authorities debriefed Petitioner Sweeney regarding the federal offense, and then an officer representing the Clark County, Indiana prosecuting attorney interrogated Petitioner Sweeney regarding a separate murder investigation, Petitioner Sweeney gave a lengthy statement regarding the state murder investigation which led directly to his indictment and conviction for murder.

It is uncontested that Petitioner Sweeney was a suspect in the murder investigation at the time he was interrogated.

> VANCE ARNOLD: Mr. Sweeney was suspected of murder.

> Q: And you knew that before you conducted debriefing on June 30th, is that correct?
>
> VANCE ARNOLD: Yes. [Vance Arnold, R. 696]

It is uncontested that Petitioner Sweeney was never warned that his statement could and would be used against him, as required by this Court's decision in *Miranda v. Arizona*, 384 U.S. 436 (1966).

The record reflects indisputable evidence that the defendant was in federal custody and indeed was not advised of his *Miranda* rights. [Opinion, Appendix, p. 34a, quoted *supra*]

In *Miranda*, this Court stated the warning requirement and the reason for the warning.

> The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. *Miranda, supra*, 384 U.S. at 469.

At the two-day interrogation, Petitioner Sweeney had been advised by his attorneys that whatever he said concerning the state murder investigation *could not be used*

against him because they had obtained a use immunity agreement with the prosecuting attorney. This advice was incorrect.

Had Petitioner Sweeney been advised of his *Miranda* right to remain silent, with the warning that whatever he said could and would be used against him, as required by this Court, *his attorneys' incorrect advice would have been exposed, and he would have known the peril he faced.* Had he been given the *Miranda* warning, as required, Petitioner Sweeney would have been able to make the knowing and voluntary choice guaranteed by the Fifth Amendment protection against self-incrimination.

Without the required *Miranda* warning, Petitioner Sweeney's statement was neither knowingly nor voluntarily made. Nevertheless, the state utilized the statement and evidence developed directly from it to indict and convict Petitioner Sweeney.

Petitioner Sweeney respectfully urges this Court to protect the Fifth Amendment privilege against self-incrimination, as it arises in this particular case.

II.

Certiorari should be granted to determine whether a suspect's statement can be knowing and voluntary, where it was induced by the suspect's own attorneys' unequivocal, but incorrect, assurances that the state prosecuting attorney had agreed to provide use immunity so that whatever the suspect said concerning a

state murder investigation could not be used against him, which agreement had not in fact been reached, contrary to this Court's decisions in *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Shotwell Manufacturing Company v. United States*, 371 U.S. 341 (1963).

As set forth in detail in the Statement of the Case, *supra*, Petitioner Sweeney was interrogated in custody for two days by federal officers and an officer representing the Clark County, Indiana prosecuting attorney. The federal officers debriefed Petitioner Sweeney regarding the plea-bargained federal offense, and the officer representing the Clark County, Indiana prosecuting attorney interrogated Petitioner Sweeney regarding a state investigation into the homicide of Danny Guthrie.

Prior to the interrogation of Petitioner Sweeney regarding the state murder investigation, Petitioner Sweeney's attorney Mike McDaniel contacted Clark County prosecuting attorney Steven Stewart regarding use immunity for any statement regarding the murder investigation. Both of Petitioner Sweeney's attorneys believed they had obtained a use immunity agreement with Stewart regarding the murder investigation, and they communicated that agreement to Petitioner Sweeney.

> The terms of the agreement were related to Chuck Sweeney. ... There's no doubt in my mind that Chuck Sweeney, from his perspective, was -- had an understanding that he was being afforded use immunity -- immunity within the context of what's on my

> notes, before he gave the authorities any type of information dealing with Daniel Guthrie, or the whereabouts of his body. [Edwin Sedwick Deposition, R. 669, pp. 10, 26]

Any doubt Petitioner Sweeney may have had about the existence and protection of the use immunity agreement was dispelled by his attorney McDaniel's reassurance that the use immunity agreement was "carved in stone." [McDaniel, R. 627]

Sweeney's attorneys' understanding that a use immunity agreement had been reached was incorrect. In fact, the Clark County prosecuting attorney denied that such an agreement had been reached. [Stewart, R. 672] The technical requirements for use immunity in Indiana had not been met. The Indiana Supreme Court's Opinion decided the instant issue by holding that no use immunity agreement existed between Sweeney's attorneys and the state prosecutor [Opinion, Appendix, pp. 35a-36a]; but it is submitted the constitutional issue is whether Petitioner Sweeney's attorneys' assurances that a use immunity agreement was in place to protect his statements induced Petitioner Sweeney's statements.

From Petitioner Sweeney's viewpoint, the effect of the incorrect assurances of his own attorneys was no different than it would have been had the Clark County prosecuting attorney entered into the alleged use immunity agreement and then broken it. Petitioner Sweeney was entirely in the hands of his attorneys, who were also officers of the court, and he was fully entitled to believe

that the misrepresentations made to him by his attorneys McDaniel and Sedwick were true.

Here there was a flat incorrect representation by McDaniel and Sedwick that there was an agreement for use immunity in exchange for Petitioner Sweeney's statements regarding the Guthrie homicide, though there was no agreement. It was of no constitutional difference to Petitioner Sweeney whether the use immunity agreement was reached and not kept, or whether it was never in fact reached.

It is uncontested that Petitioner Sweeney's attorneys represented to him that the Clark County prosecutor had entered into the use immunity agreement and that Petitioner Sweeney's statements regarding the Guthrie homicide would be protected.

A promise that statements made will not be used against the declarant is a truly powerful promise, going to the heart of a declarant's reservations about giving a statement. In *Shotwell Manufacturing Company v. United States*, 371 U.S. 341 (1963), this Court stated the particularly coercive effect of a "promise of immunity."

> It is of course a constitutional principle of long standing that the prosecution must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. [Citation omitted.] We have no hesitation in saying that this principle also reaches evidence of guilt induced from a person under a governmental promise of

> immunity, and where that is the case such evidence must be excluded under the Self-Incrimination Clause of the Fifth Amendment. [Numerous citations omitted.] *Shotwell*, *supra*, at 347.

In a word, the assurance that an immunity agreement is in place is so attractive that it renders resulting statements involuntary. In *Malloy v. Hogan*, 378 U.S. 1 (1964), this Court held that, to be voluntary, the confession or statement

> must not be ... obtained by any direct or implied promises, however slight. *Malloy*, *supra*, p. 7.

Accord, Hutto v. Ross, 429 U.S. 28, 30 (1976).

Where substantial evidence demonstrates that Petitioner Sweeney's statements regarding the Guthrie homicide were induced by his attorneys' unequivocal assurances that use immunity was in place, an inducement recognized by this Court in *Shotwell* as especially powerful, and where this Court has held in *Malloy* that a confession is not voluntary when it is "obtained by any direct or implied promises," it is impossible to discern how Petitioner Sweeney's June 30, 1992 statements regarding the Guthrie homicide could be said to be knowing and voluntary.

Petitioner Sweeney respectfully urges this Court to protect the Fifth Amendment privilege against self-incrimination, as it arises in this particular case.

III.

Certiorari should be granted to determine whether Petitioner Sweeney was denied the effective assistance of counsel under the Fifth and Sixth Amendments when his attorneys assured him that the Clark County prosecuting attorney had agreed to provide use immunity for Petitioner Sweeney's statements regarding the Guthrie homicide, when in fact no such use immunity agreement had been agreed upon by the Clark County prosecuting attorney, and Petitioner Sweeney's statements made in reliance upon his attorneys' assurances were subsequently used against him as a basis for his indictment and conviction of murder, contrary to this Court's holdings in *Miranda v. Arizona*, 384 U.S. 436 (1966), *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Davis v. United States*, 512 U.S. 452 (1994).

As set forth in detail in the Statement of the Case, *supra*, and in issue II, *supra*, Petitioner Sweeney was induced to make a lengthy statement regarding the Guthrie homicide by his attorneys' assurances that they had secured a use immunity agreement with the Clark County prosecuting attorney and that Petitioner Sweeney's statement would not therefore be used against him later. Petitioner Sweeney's attorneys were incorrect in their assurances; the prosecuting attorney *had not agreed* to provide use immunity, and the agreement did not satisfy the technical requirements for use immunity in Indiana any-

way. Contrary to the assurances of his attorneys regarding use immunity, Petitioner Sweeney's statement was used as the basis for his state indictment and conviction for murder.

These circumstances set forth the deficient performance and prejudice which are the hallmarks of the denial of effective assistance of counsel, as identified in this Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984). The deficient performance is the lawyers' incorrect advice to Petitioner Sweeney which encouraged him to make the statement regarding the Guthrie homicide. The prejudice is the evisceration of Petitioner Sweeney's Fifth Amendment privilege against self-incrimination and the resulting conviction based on his statement regarding the Guthrie homicide.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court announced a "Fifth Amendment" right to counsel to protect the Fifth Amendment privilege against self-incrimination.

> [T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. *Miranda*, *supra*, at 469.

This Court has reaffirmed the right to have counsel present during custodial interrogation. For instance, in *Davis v. United States*, 512 U.S. 452 (1994), this Court stated:

> We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial

> interrogation even though the Constitution does not prove for such assistance. ... [B]efore proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, we held in *Miranda v. Arizona*, 384 U.S. 436, 469-473, 86 S.Ct. 1602, 1625-1627, 16 L.Ed.2d 694 (1966), that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning. *Davis*, *supra*, at 457, 462.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court reaffirmed a state defendant's Fifth Amendment right "to have counsel present during custodial interrogation."

> *Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. ... The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. *Edwards*, *supra*, at 482, 485-486.

Petitioner Sweeney's Fifth Amendment right to counsel was rendered a farce and a mockery, resulting in his conviction for murder, when his attorneys McDaniel and Sedwick induced him with assurances of a use immunity agreement which did not exist to deliver up the lengthy statement which convicted him out of his own mouth. The prejudice to Petitioner Sweeney is undeniable. It is difficult to see how incorrect representations by counsel,

however motivated, could have had more disastrous consequences for the client.

Whether these circumstances are perceived as a violation of Petitioner Sweeney's right to counsel under the Fifth Amendment or under the Sixth Amendment, Petitioner Sweeney respectfully urges this Court to protect his right to effective assistance of counsel as indispensable to the protection of his Fifth Amendment privilege against self-incrimination, as arises in this particular case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Burton Milward, Jr.
BURTON MILWARD, JR.
Attorney at Law
332 Duke Road
Lexington, Kentucky 40502
(606) 269-2001
Counsel of Record for Petitioner

David E. Mosley
Of Counsel

Date: March 12, 1999
Lexington, Kentucky

APPENDIX A

ATTORNEYS FOR APPELLANT
John L. Davis
Bonnie K. Wooten
Pritzke & Davis
Greenfield, Indiana

ATTORNEYS FOR APPELLEE
Jeffrey A. Modisett
Attorney General of Indiana

Cynthia L. Ploughe
Deputy Attorney General
Indianapolis, Indiana

IN THE INDIANA SUPREME COURT

CHARLES EDWARD SWEENEY, JR., Appellant (Defendant below),	Supreme Court No. 10S00-9603-CR-231
v.	
STATE OF INDIANA, Appellee (Plaintiff below).	

APPEAL FROM THE CLARK CIRCUIT COURT
The Honorable Daniel F. Donahue, Judge
Cause No. 10C01-9403-CF-51

ON DIRECT APPEAL

December 18, 1998

SULLIVAN, Justice

Defendant Charles Edward Sweeney, Jr., appeals his conviction for Murder.[1] Defendant was sentenced to

[1] Ind Code § 35-42-1-1 (Supp. 1990).

60 years. We have jurisdiction over this direct appeal because the longest single sentence exceeds 50 years. Ind. Const. art. VII, § 4; Ind. Appellate Rule 4(A)(7). We affirm defendant's conviction and sentence.

Background

On May 28, 1991, the victim, Danny Guthrie, left his family to go fishing with defendant. Guthrie did not return home that evening and his wife assumed that he decided to camp over with defendant. The next morning defendant called to see if Guthrie wanted to check the trout lines. Guthrie's wife informed the defendant that Guthrie never returned home and the defendant told Guthrie's wife that be brought Guthrie home between 4:00 and 6:00 p.m. the previous day. After several unsuccessful attempts to obtain more information from defendant, Guthrie's wife called the police. On May 29, 1991, Detective Kramer, the lead investigator, and other police officers questioned the defendant at his home. However, no arrest was made and Guthrie remained missing.

In February, 1992, defendant was investigated by the Bureau of Alcohol, Tobacco and Firearms for placing a pipe bomb under Detective Kramer's police car.[2] After being charged for these offenses, defendant entered into a

---

[2]Defendant claimed that he placed the bomb under Kramer's police car because Kramer had been "'hounding him' on the missing person investigation of Guthrie." (R. at 51.) As a result of placing the pipe bomb under Kramer's car, defendant was charged with the federal offenses of Attempting to Damage a Vehicle by Use of a Bomb (Title 18, U.S. Code, § 844(i)) and using a bomb in connection with a crime of violence (Title 18, U.S. Code, § 924 (c)). (R. at 19.)

plea agreement with the U.S. Attorney's Office on June 26, 1992. Pursuant to the plea agreement, defendant pled guilty to placing the bomb under Kramer's car, agreed to implicate all others involved in the bombing and also to disclose the whereabouts of Guthrie's body and any information relating to the cause of Guthrie's death.[3] We summarize defendant's story as communicated to federal authorities as follows.[4]

According to defendant, on the return trip from the fishing expedition, defendant agreed to give Guthrie approximately 150 marijuana plants in exchange for a saddle. Immediately after arriving at defendant's home, defendant explained to Guthrie where the marijuana plants were located and provided Guthrie with a shovel, two buckets, and a 9mm gun for protection. Defendant claimed that he then went to play bingo at the Sellersburg Moose Lodge and did not see Guthrie again that evening.[5]

---

[3]We presume that because the federal charges concerned Kramer and because Kramer had knowledge of defendant's possible role in the missing person of Guthrie, the federal plea agreement was based on defendant providing information regarding Guthrie's whereabouts.

[4]Defendant did not testify at trial nor is there a transcript of the defendant's statements to federal authorities in compliance with the plea agreement. However, several of the officers present at the time defendant provided his story testified at trial as to their recollection of defendant's statements.

[5]Mike Jones, a former Governor of the Sellersburg Moose Lodge, testified that in 1991, the Moose Lodge operated a Bingo game every Wednesday and Friday night from 7:30 to 10:00 p.m. (R. at 1520-21.) May 28, 1991, the night that defendant claimed to play bingo, fell on a Tuesday.

The next day (May 29, 1991), after Guthrie's wife claimed that Guthrie never came home, defendant alleges that he went to look for Guthrie and found him dead with a gunshot wound to the head. He also found the 9mm gun that he had given Guthrie the day before with one round missing and an empty shell casing a foot or two south of Guthrie's body. Because defendant did not want the police to discover the marijuana, he dragged Guthrie's body to a ditch located behind a trailer and buried the body with sweet lime and covered it with dirt and trash. He then threw the shell casings in a creek, and placed one shoe[6] and a pair of sunglasses in the burn barrel by his trailer. Defendant also buried the gun in an ammunition can near his home, but at a later date retrieved the gun and had it in his possession for personal protection. Defendant told the authorities that eventually the gun was seized from him in the State of Utah as a result of a routine traffic violation. At all times, defendant proclaimed his innocence.[7]

On July 1, 1992, the police obtained a search warrant for defendant's property and located Guthrie's body in the area described by defendant. An autopsy was performed on the body on July 2, 1992, and the medical

---

[6]Defendant found Guthrie wearing only one shoe and the other shoe about 30-40 feet from the body. (R. at 1601.)

[7]While providing these statements to federal authorities, defendant indicated that he thought Guthrie was working for the police. (R. at 1312.)

examiner positively identified the body as that of Daniel Guthrie. The examiner also retrieved the bullet that caused Guthrie's death. The bullet and the 9mm gun that was confiscated from defendant by a Utah police officer was sent to the Bureau of Alcohol, Tobacco and Firearm Laboratory. The Bureau confirmed that the bullet that killed Guthrie had been fired from the 9mm gun belonging to the defendant.

On August 10, 1992, Judge Donahue in the Clark Circuit Court issued a warrant to arrest the defendant for the murder of Guthrie. On October 8, 1992, upon the State's request, Judge Donahue issued a writ of habeas corpus ad prosequendum (a writ of habeas corpus ad prosequendum is referred to in this opinion as a "Writ") so that the State could obtain temporary custody of defendant. At that time, defendant was incarcerated in federal prison in Louisville, Kentucky[8] and was scheduled to be sentenced that very same day by Judge Barker in the United States District Court for the Southern District of Indiana.[9] The defendant was transported to Clark County shortly after the Writ was issued. On October 22, 1992, defendant filed a Motion to Quash the Writ, and a hearing was held on the motion on November 10, 1992. The focus of the hearing concerned whether the State had jurisdiction over the defendant. Defendant argued that before he was sentenced in federal court, the State could have

---

[8]The record suggests that defendant was initially incarcerated in the Federal Bureau of Prisons in Leavenworth, Kansas. (R. at 19.)

[9]Defendant was sentenced to serve 210 months in federal prison. (R. at 501.)

sought temporary custody of him through the use of the Writ, but once defendant was sentenced, the State was obligated to follow the procedures set forth in the Interstate Agreement on Detainers (referred to in this opinion as the "IAD").[10] In order to avoid conducting a trial and then having a higher court decide that the trial court had no jurisdiction over defendant, Judge Donahue decided that the safer approach would be to return defendant to federal prison and proceed appropriately. Consequently, Judge Donahue granted defendant's motion and ordered that the Writ be held for naught and declared void.

On April 22, 1993, the State dismissed charges against the defendant, and defendant was sent back to federal prison in Kentucky. The State refiled charges on March 30, 1994. On August 1, 1994, upon the State's request, Judge Donahue granted another writ of habeas corpus ad prosequendum so that the State could obtain temporary custody of defendant. At this time, defendant was being held at the Federal Correctional Institution in Manchester, Kentucky. For the second time, defendant was transported to Clark County. In response, defendant filed a Motion to Quash the Writ on September 13, 1994, and on October 3, 1994, Judge Donahue held a hearing on this matter. Once again, defendant contended that the IAD was the exclusive means of obtaining temporary custody

---

[10]Defendant makes a distinction between use of the word "confined" in the statute providing for the Writ and use of the word "incarcerated" in the statute providing for the IAD. Black's Law Dictionary (5th ed.) defines incarcerations as "Imprisonment; confinement in a jail or penitentiary." Confinement is defined as "State of being confined; shut in; imprisoned . . ." We discuss these two statutes in detail infra.

of defendant. Additionally, defendant argued that the circumstances surrounding the issuance of both Writs were identical and that because the issue had been litigated, the doctrine of res judicata and collateral estoppel applied. Judge Donahue denied defendant's Motion to Quash the Writ, relying on the fact that defendant's custody status had changed since the first Writ was issued.

A jury trial was conducted on November 14, 1995, and defendant was found guilty the murder of Guthrie. The trial court sentenced defendant to 60 years to be served upon the completion of his federal sentence of 210 months.

Additional facts will be provided as necessary.

Discussion

Defendant raises the following claims on appeal: (1) the trial court erred in denying his motion to quash the second writ of habeas corpus ad prosequendum; (2) defendant was denied his statutory and constitutional right to a speedy trial; (3) the trial court erred in refusing to suppress defendant's pre-trial statements; (4) the trial court erred in denying defendant's motion to suppress the handgun; (5) defendant was denied the right to cross-examine witnesses; (6) the trial court erred in denying the defendant credit time for pre-trial detention; (7) the trial court failed to articulate the reasons for sentencing defendant to a term of years consecutive with his federal sentence and used an improper factor to enhance defendant's sentence; (8) the trial court refused to admit certain statements provided by defendant; (9) the trial court refused to allow testimony concerning other

possible reasons for the death of the victim; and (10) the State failed to establish the corpus delicti for the Murder.

I

Defendant contends that the trial court erred in denying his motion to quash the second Writ. As discussed in Background, supra, defendant's motion to quash the first Writ was granted. In defendant's motion to quash the second Writ issued against him, defendant argued that because both the first and second Writs were identical, the issue had been litigated in the hearing on the first Writ. As such, the doctrine of res judicata applied to bar enforcement of the second Writ. We disagree with defendant.

"The principle of res judicata prevents the repetitious litigation of that which is essentially the same dispute." Wagle v. Henry, 679 N.E.2d 1002, 1005 (Ind. Ct. App. 1997)(citing Scott v. Scott, 668 N.E.2d 691, 699 (Ind. Ct. App. 1996)). "For principles of res judicata to apply, there must have been a final judgment on the merits and that judgment must have been entered by a court of competent jurisdiction." Matter of Sheaffer, 655 N.E.2d 1214, 1217 (Ind. 1995).[11]

---

[11]The doctrine of res judicata is divided into two subdoctrines -- claim preclusion and issue preclusion (collateral estoppel). Defendant asserts that both subdoctrines apply. However, because we conclude that the hearing on the motion to quash the first Writ did not result in a final judgment on the merits, it is unnecessary to analyze the subdoctrines of res judicata.

In his motion to quash the first Writ, defendant argued that the IAD provided the exclusive means by which the State could secure his presence for trial and that a Writ was not available for this purpose. Our statute authorizing Writs provides that it may be used to seek the presence for criminal trial in state court of a defendant "who is confined in a federal prison." Ind. Code § 35-33-10-5. The record indicates that at the time the first Writ was issued, defendant had not yet been sentenced on federal charges and was being held on behalf of federal authorities in a Kentucky state correctional facility. Our review of the record indicates that the trial court concluded that, under these circumstances, the defendant was not confined in a federal prison within the meaning of the Writ statute. See R. at 527-28. The trial court granted the motion to quash the first Writ because, not yet having been sentenced on federal charges (albeit guilty thereof) and not being confined in a federal prison (albeit in custody for federal offenses), only the IAD and not the Writ procedures were available to the state to secure defendant's presence for trial. (The mutual availability of IAD and Writ procedures is discussed in part II, infra; it is not essential to do so here.) However, we hold that the trial court made no determination that the Writ procedures would be unavailable at some future time should defendant be sentenced and confined in a federal prison. (This is in fact what happened). As such, in granting defendant's motion to quash the first Writ, the trial court only held that the Writ was not available to secure the presence for trial of the defendant given defendant's custody status at the time the first Writ was issued. This is clear from the trial court's findings and conclusions denying the motion to quash the second Writ:

4. It is unclear from the Order of November 10, 1992, the grounds upon which the Writ was quashed. No Findings of Fact or Conclusions of Law were entered. During the argument on the Motion in 1992, some argument was had relating to the custody status of the Defendant. At the time of the Motion in 1992, the Defendant was not housed in a federal prison. When the 1994 Writ was issued and served, the Defendant was housed in a federal prison at the Federal Correctional Institution in Manchester, Kentucky.

5. L.C. 35-33-10-5 requires that the defendant be "confined in a federal prison or other institution" before a Writ of Habeas Corpus Ad Prosequendum may issue.

6. In light of the general nature of the 1992 Order quashing the Writ, and in light of the Defendant's change of custody status since 1992, the issue now facing the Court cannot be said to have been litigated and determined previously. It cannot be said that the 1992 Order determined that a Writ of Habeas Corpus Ad Prosequendum would forever be an improper means of securing the attendance of a Defendant in federal custody. On this basis, the doctrines of res judicata and collateral estoppel do not bar litigation of the issues raised by the 1994 Writ of Habeas Corpus Ad

Prosequendum and the Defendant's Motion to Quash.

(R. at 85-86.)

Because the trial court's determination to grant the motion to quash the first Writ was a function of the defendant's custody status at the time the first writ was issued, res judicata did not preclude the trial court from reaching a different determination after defendant's custody status had changed. See Matter of a Search Warrant, 448 N.E.2d 1089, 1094 (Ind. Ct. App. 1983)("Each search warrant application was a distinct justiciable matter, supported by independent proof.").

II

Defendant claims that he was entitled to have the murder charges against him dismissed because the State violated the anti-shuffling provision of the IAD. In general, the IAD prohibits the transporting of defendants back and forth between jurisdictions. Defendant contends that by being transported back and forth between Indiana and Kentucky (as described in Background, supra), the anti-shuffling provision of the IAD was violated. Defendant's argument is correct if in fact the IAD is applicable in this case. See generally State v. Greenwood, 665 N.E.2d 579, 583 (Ind. 1996)(the IAD "requires dismissal with prejudice if the prisoner is returned to the first state prior to trial").

Analyzing defendant's claim requires a discussion of two Indiana statutes -- Ind. Code § 35-33-10-4 (1988), adopting the IAD, and Ind. Code § 35-33-10-5 (1988)

providing for Writs. While the statutes are separate and distinct, they have similar purposes in that both set forth procedural safeguards for securing the presence of a prisoner in Indiana who is located in a foreign jurisdiction.[12] See generally United States v. Kenaan, 557 F.2d 912, 915 (1st Cir. 1977).

A

We begin with a brief discussion of the history and function of both the IAD and the Writ. Although the origins of the IAD date back to 1948, the statute was not adopted by the federal government until 1970. The statute was created to solve several problems which arose from the use of detainers. Although the IAD does not define a detainer, the congressional record provides that "[a] detainer is a notification filed with the institution in which a prisoner is serving a sentence, advising that he is wanted to face pending criminal charges in another jurisdiction." United States v. Mauro, 436 U.S. 340, 359 (1978)(quoting H.R.Rep. No. 91-1018, p. 2 (1970); S.Rep. No. 91-1356, p. 2 (1970; U.S. Code Cong. & Admin. News 1970, p. 4865). "Before the [IAD] was

---

[12]We also note that the Uniform Criminal Extradition Act, Ind. Code § 35-33-10-3 (1988), serves a similar purpose. Pursuant to the Extradition Act, "it is the duty of the governor to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that State with treason, a felony, or other crime who has fled from justice and is found in this State." Ind. Code § 35-33-10-3(2). The demand for the extradition of a person charged with a crime in another state must be in writing and accompanied by a copy of an indictment found or by an information supported by affidavit in the State having jurisdiction of the crime. Ind. Code § 35-33-10-3(3).

enacted, there was no legal mechanism for prisoners to clear detainers filed against them by authorities outside the jurisdiction in which they were imprisoned." United States v. Collins, 90 F.3d 1420, 1425 n.1 (9th Cir. 1996)(citing Birdwell v. Skeen, 983 F.2d 1332, 1335 (5th Cir. 1993)). Consequently, detainers had the capability of restricting, circumscribing, or disrupting the activities, including rehabilitative activities, of prisoners within the 'sending state's' prison.[13] Flick v. Blevins, 887 F.2d 778, 781 (7th Cir. 1989). See Greenwood, 665 N.E.2d at 583. This is because in the past, detainers would remain lodged against a prisoner for several years and cause serious problems: (1) the prisoner would be ineligible for work assignments and (2) the prisoner often lost interest in institutional opportunities because he was serving his current sentence without knowing what additional sentence may be imposed on him or if and when he would be able to employ the education and skills developed while in prison.[14] Mauro, 436 U.S. at 353 (quoting H.R.Rep. No. 91-1018, p. 3 (1970); S.Rep. No. 91-1356, p. 3 (1970), U.S. Code Cong. & Admin. News 1970, pp. 4864, 4866).

---

[13]Ind. Code § 35-33-10-4 (1988) defines "sending state" as "a state in which a prisoner is incarcerated at the time he initiates a request for final disposition pursuant to Article 3 of this section or at the time that a request for custody or availability is initiated pursuant to Article 4 hereof." "Receiving state" means the state in which trial is to be had on an indictment, information or complaint pursuant to Article 3 or Article 4 of the IAD, discussed in the text infra.

[14]See United States ex. rel. Esola v. Groomes, 520 F.2d 830, 837 (3d Cir. 1975)("psychological strain resulting from uncertainty about future sentence decreases an inmate's desire to take advantage of institutional opportunities"); Smith v. Hooey, 374, 379 (1969).

As a result of problems created by the use of detainers, the federal government and all the states that adopted the IAD determined that the primary purpose of the IAD would be to "provide for expeditious disposition of all outstanding charges which may affect the conditions or duration of imprisonment and treatment," and also to prescribe procedures by which a state may obtain a prisoner incarcerated in another state. Interstate Agreement on Detainers Act, 18 U.S.C.A., pp. 1395-1398 (1976 ed.), Art. I. See Mauro, 436 U.S. at 351; Greenwood, 665 N.E.2d at 583; Webb v. State, 437 N.E.2d 1330, 1332 (Ind. 1982). The IAD also "provide[s] cooperate procedures among member states to facilitate such disposition." Mauro, 436 U.S. at 351.

The central provisions of the IAD are contained in Articles 3 and 4. Article 3 establishes a procedure by which a prisoner against whom a detainer has been lodged can demand a speedy disposition of the charges. If the prisoner makes such a request, the prisoner must be brought to trial within 180 days after the prisoner causes to be delivered to the prosecuting officer and the appropriate court written notice of imprisonment and request for final disposition of the charges. Article 4 provides the means by which a prosecutor can obtain temporary custody of a defendant in order to dispose of outstanding charges. Under Article 4, the prisoner must be brought to trial within 120 days "of the arrival of the prisoner in the receiving state." If the prisoner is not brought to trial within the allotted time periods or the prisoner is returned to the "sending state" without bringing the prisoner to trial, the charges will be dismissed with prejudice. This is often referred to as the "anti-shuffling" provision.

The statute providing for Writs is less complex than the statute providing for the IAD, but is deeply rooted in history. The Writ[15] has origins dating back to the first Judiciary Act, 1 Stat. 81, § 14 (1789),[16] and it has always served as a means by which to bring a prisoner

---

[15]A Writ is a certificate "addressed to the attorney general of the United States, certifying that such defendant has been charged by indictment or information filed against him in the specified court with the offense or offenses alleged therein, and that attendance of the defendant in such court for the purpose of criminal prosecution thereon is necessary in the interest of justice and requesting the attorney general of the United States to cause such defendant to be produced in such court, under custody of a federal public servant, upon a designated date and for a period of time necessary to complete the prosecution." Ind. Code § 35-33-10-5(b)(2)(1988).

[16]Section 14 of the First Judiciary Act gave authority to

> "all the * * * courts of the United States * * * to issue writs of scire facias, habeas corpus, and all other writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And * * * either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of commitment. -- Provided, That writs of habeas corpus shall in no case extend to prisoners in gaol, unless where they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81-82 (1789).

Carbo v. United States, 364 U.S. 611, 614 (1961).

from a foreign jurisdiction to another jurisdiction for criminal prosecution of outstanding charges.[17]

> Although § 14 did not expressly state that the courts could issue ad prosequendum writs, the Court in an opinion by Mr. Chief Justice Marshall, Ex parte Bollman, 4 Cranch 75, 2 L.Ed. 554 (1807), interpreted the words "habeas corpus" as being a generic term including the writ necessary to remove a prisoner in order to prosecute him in the proper jurisdiction wherein the offense was committed. Carbo [v. United States], 364 U.S. [611], 615 [(1961)], 81 S.Ct., at 341 (emphasis omitted). Since the time of Ex parte Bollman, the statutory authority of federal courts to issue writs of habeas corpus ad prosequendum to secure the presence, for purposes of trial, of defendants in federal criminal cases, including defendants then in state custody, has never been doubted.

Mauro, 436 U.S. at 357-58.[18] The Supreme Court in Carbo held that "there is no indication that there is required today a more restricted view of the writ of habeas

---

[17]"The writ is . . . a procedural device used by a prosecutor who is actively seeking a disposition of pending criminal charges, not merely attempting to hold the defendant for some future date." People v. Squitieri, 397 N.Y.S.2d 888, 891 (N.Y. 1977).

[18]For a more detailed description of the historical evolution of the writ of habeas corpus ad prosequendum, see Carbo v. United States, 364 U.S. 611 (1961).

corpus ad prosequendum than was necessary in 1807 when Chief Justice Marshall considered it." Carbo, 364 U.S. at 620. Additionally, the applicability of the Writ has not been superseded by the creation of the IAD. The Supreme Court recognized that when Congress drafted the IAD it "was well aware of the use of such writs by the Federal Government to obtain state prisoners and that when it used the word 'detainer,' it meant something quite different from a writ of habeas corpus ad prosequendum." Mauro, 436 U.S. at 361.

In Mauro, the Supreme Court elaborated on three main differences between detainers and Writs. Mauro, 436 U.S. at 358. First, a Writ may only be issued by a court, whereas a detainer may be lodged against a prisoner either upon the initiative of a prosecutor or law enforcement officer. Id. Second, a Writ requires the immediate presence of the prisoner but a detainer merely notifies prison authorities that the prisoner is wanted in another jurisdiction upon release to face pending criminal charges. Id. If a detainer is lodged, the receiving state must take further action in order to obtain temporary custody over the prisoner. Finally, because a Writ requires immediate action, it is valid only for a short period of time. On the other hand, a detainer may remain lodged against the prisoner for a lengthy period of time, even for the span of the prisoner's sentence. Id.

The decision of whether to use a detainer or a Writ to obtain custody of a prisoner only arises when the prisoner is confined in a federal prison; Writs are not

available with respect to prisoners incarcerated or confined in other states.[19] Ind. Code § 35-33-10-5.

---

[19]There are advantages and disadvantages to the State's use of either detainers or writs in obtaining prisoners in federal custody. The primary disadvantage of using a detainer is that the IAD contains the anti-shuffling provision. Use of a Writ does not present such a problem and thus when custody of a prisoner is obtained through a Writ, the prisoner may be transported back and forth between jurisdictions.

Another disadvantage of using a detainer, although minor, is that a prisoner may challenge the "legality of his delivery" to the receiving state. Ind. Code § 35-33-10-4, Art. 4(d). The statute providing for the use of Writs does not establish any such rights for the prisoner.

The primary advantage to the State of utilizing detainers is that a uniform procedure under the IAD exists and both sending and receiving states (and the federal government) must comply with the procedures. On the other hand, Writs can only be issued to obtain custody of defendants confined in federal prison. See Ind. Code §35-33-10-5 (permitting the use of Writs only for prisoners confined in federal prisons or institutions). Additionally, the United States Supreme Court has held that state courts lack jurisdiction to issue Writs to order the production, or otherwise interfere, with prisoners in federal custody. Abelman v. Booth, 62 U.S. 506, 523-24 (1859). This principle has been reaffirmed on several occasions. See Comm. of Puerto Rico v. Perez Casillas, 624 F.Supp. 822, 830 n.5 (D.P.R. 1985). However, the federal government may, based on principles of comity, honor state-issued Writs. See Ponzi v. Fessenden et al., 258 U.S. 254, 261-62 (1922); People v. McLemore, 311 N.W.2d 720, 721 (Mich. 1981); Runck v. State, 497 N.W.2d 74, 80 n.3 (N.D. 1993). This is apparently what happened here.

Another advantage of using detainers is that they can be lodged against a prisoner relatively easily because they can be filed by either a prosecutor or law enforcement official and do not need to be authorized by a court. Writs, on the other hand, can only be issued by a court in which the criminal action against the prisoner is pending.

B

Under the circumstances of this case, we find that the Writ statute, and not the IAD statute, was controlling. Upon the State's request, the Clark County court issued a Writ on two occasions. There is no indication that a detainer was ever lodged against the defendant nor is there any indication that the State intended a Writ to serve as a detainer.

The facts of this case are similar to the facts of one of the cases disposed of by the landmark decision in Mauro, 436 U.S. 340. In Mauro, federal authorities were granted two Writs which directed the warden of the state prison to produce two defendants for prosecution in federal court. Because of the overcrowded conditions in the federal court, the defendants were returned to their respective state prisons. Several months later, the defendants were again removed from state prison and taken into federal custody pursuant to a Writ. The defendants moved to dismiss the charges on the grounds that the anti-shuffling provisions of the IAD had been violated.

In holding that dismissal was not appropriate, the United States Supreme Court held that "a writ issued by a federal court to state authorities, directing the production of a state prisoner for trial on criminal charges, is not a detainer within the meaning of the [IAD] and thus does not trigger the application of the [IAD]." Mauro, 436 U.S. at 349. See Flick v. Blevins, 887 F.2d 778, 781 (7th Cir. 1989); McLemore, 311 N.W.2d at 721; People v. Befeld, 413 N.E.2d 550, 552 (Ill. Ct. App. 1980). "[T]he provisions of the [IAD] are triggered only when a 'detainer' is

filed with the custodial (sending) State by another State (receiving) having untried charges pending against the prisoner." Mauro, 436 U.S. at 343.

Although the watershed decision rendered in Mauro set forth that Writs are not detainers which invoke the application of the IAD, it is notable that Mauro dealt exclusively with Writs issued by federal courts. However, "[t]he decision in Mauro has been followed regardless of whether the writ emanated from federal or state court." McLemore, 311 N.W.2d at 721 (footnote containing citations omitted). See Runck, 497 N.W.2d at 80. Because there appears to be little reason for distinguishing between Writs issued by federal and state courts, we hold this to be the law in Indiana.

Pursuant to Ind. Code § 35-33-10-5, courts in Indiana have statutory authority to issue Writs to secure the presence of prisoners in federal custody for purposes of criminal prosecution. The State requested the issuance of a writ both in 1992 and in 1994, but never requested that a detainer be lodged against defendant. The trial court found, "No evidence has been presented that the State of Indiana ever filed a detainer so as to trigger the requirements of the I.A.D. In the absence of such proof, the I.A.D. simply does not apply." (R. at 87.)

Defendant, however, claims that "the IAD is the exclusive means to secure the presence of a defendant for purposes of prosecution." Br. of Appellant at 14. Defendant's contention is clearly mistaken. First, Indiana has definitively denominated two methods of securing the presence of defendants who are in the custody of foreign jurisdictions -- the IAD pursuant to Ind. Code §

35-33-10-4 and the Writ set forth in Ind. Code § 35-33-10-5.[20] Second, as we discussed supra, the Writ has continued to be accepted as a proper procedure for securing the presence of prisoners for criminal prosecution. See Mauro, 436 U.S. at 358 ("The role and functioning of the ad prosequendum writ are rooted in history, and they bear little resemblance to the typical detainer which activates the provisions of the [IAD]."). See also McLemore, 311 N.W.2d at 721 ("The decision by federal authorities to honor a writ in the absence of a detainer as a matter of comity does not trigger the provision of the [IAD]."); Flick, 887 F.2d at 778.[21] And finally, a Writ does not constitute a detainer for purposes of the IAD. This is true regardless of whether the Writ is issued by a state or federal court.

For the foregoing reasons, we find that the Writ statute and not the IAD statute was applicable in this case. Consequently, the anti-shuffling provision of the IAD was

---

[20]There have been only a handful of cases where the State has used a Writ as the exclusive means of obtaining temporary custody of a prisoner confined in a federal prison. In none of these cases did the defendant challenge the validity of the Writ. See, e.g., Shropshire v. State, 501 N.E.2d 445, 446 (Ind. 1986); Weatherford v. State, 328 N.E.2d 756, 758 (Ind. 1975), overruled on other grounds by Holland v. State, 352 N.E.2d 752, 762 (Ind. 1976); Smith v. State, 330 N.E.2d 384, 388 (Ind. Ct. App. 1975).

[21]See the following cases which were decided before United States v. Mauro, 436 U.S. 340 (1978); Morgan v. United States, 380 F.2d 686 (9th Cir. 1967)("A writ of habeas corpus ad prosequendum is the correct way to bring a prisoner under incarceration by state and federal courts to trial for alleged violations of laws."); Lawrence v. Willingham, 373 F.2d 731 (10th Cir. 1967)("A writ of habeas corpus ad prosequendum is a necessary tool for jurisdictional potency.").

never implicated and defendant was not entitled to dismissal on that basis.[22]

Defendant contends that he was denied his constitutional and statutory right to a speedy trial under U.S. Const. Amend. VI,[23] Ind. Const. art. I, § 12,[24] and Ind. Crim. Rule 4(C).[25]

---

[22]Defendant relies on Webb v. State, 437 N.E.2d 1330 (Ind. 1992), to support his proposition that even if the State properly used the writ to obtain custody of defendant, the anti-shuffling provision of the IAD applies in this case. Defendant's contention is based upon our conclusion in Webb wherein we stated that the "writ of habeas corpus ad prosequendum is a 'written request for temporary custody' within the meaning of Article 4 of the IAD." Webb, 437 N.E.2d at 1331. This was true in Webb because the State initially filed a detainer against the defendant while he was serving a sentence in a federal prison, thus invoking the IAD. The detainer only served as a notice to federal prison authorities that defendant was wanted by Indiana to face pending criminal charges. In order to actually obtain temporary custody of defendant, a written request had to be made which in this case was done by utilizing a Writ. Consequently, only because a detainer was initially lodged was the Writ considered a "written request for temporary custody" within the meaning of the IAD. On the other hand, if a detainer had never been lodged, the issuance of the Writ would not have invoked the IAD. See United States v. Mauro, 436 U.S. 340, 361 (1978). Therefore, the circumstances in Webb were sufficiently different from this case so as not to control its disposition.

[23]The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."

[24]Indiana Const. art. I, § 12 provides, in part: "Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

[25]Ind. Crim. Rule 4(C) provides:

No person shall be held on recognizance or oth-

A

When reviewing a claim for a violation of the right to a speedy trial, we ordinarily begin our analysis with Crim.R. 4. This is because "Crim. Rule 4 generally implements the constitutional right of a criminal defendant to a speedy trial, thereby establishing time limits and providing for discharge in the event that limits are exceeded." Bridwell v. State, 659 N.E.2d 552, 553 (Ind. 1995). See Austin v. State, 682 N.E.2d 1287, 1288 (Ind. 1997); Joyner v. State, 678 N.E.2d 386, 391 (Ind. 1997). Before determining whether Crim.R.4(C) was violated, we must first determine whether the rule applies to the circumstances of this case. We hold that it does.

A-1

The State contends that Crim.R. 4(C) does not apply because defendant was incarcerated in a foreign jurisdiction at the time the present charges were filed. Instead, the State contends that the IAD applies for purposes of speedy trial rights and relies on Brown v. State, 497 N.E.2d 1049 (Ind. 1986), for this contention. We believe the State misapplies Brown.

> erwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of this arrest on such charge, whichever is later, except where a continuance was had on his Motion or the delay was caused by his act, or where there was not sufficient time to try him during such period because of the congestion of the court calendar . . . .

In Brown, the defendant was charged in Indiana and was released on bond. Two days later, defendant was arrested in Kentucky and served approximately a one year sentence before being returned to Indiana. We concluded in Brown that the IAD, rather than Crim.R. 4(C), governs the speedy trial rights of a defendant incarcerated in another jurisdiction. See Williams v. State, 533 N.E.2d 1193, 1195 (Ind. 1989)("Ind.R.Cr.P. 4 does not apply when the IAD statute is applicable. Brown v. State (1986), Ind. 497 N.E.2d 1049."). This conclusion was based on Heflin v. State, 275 Ind. 197, 416 N.E.2d 121 (1981), where the IAD applied because a detainer had been lodged. In Heflin, after Indiana authorities placed a detainer on a defendant in federal prison, the defendant filed a motion for a speedy trial and later filed a motion to dismiss for a denial of his constitutional right to a speedy trial, but not a violation of Crim.R. 4(B). On appeal from the denial of post-conviction relief, defendant asserted that appellate counsel was ineffective for not raising or preserving for appeal the issue of Crim.R. 4(B). We held that since defendant was imprisoned in another jurisdiction, his request for a speedy trial triggered the application of the IAD. Id. at 124. Cf. United States v. Castor, 937 F.2d 293, 296 (7th Cir. 1991)(detainee awaiting trial in local jail does not have a sufficient interest in the confining institution's rehabilitative programs to justify invocation of the IAD). Our holding in Heflin should have been more precise. In fact, the IAD was applicable for purposes of a speedy trial because a detainer had been lodged and not simply because the defendant was in a foreign jurisdiction. See, e.g., McLemore, 311 N.W.2d at 721 ("Since the prosecution in this instant case obtained temporary custody as a result of the writ and no detainer

had been lodged against the defendant, the time provision for trial in Article IV(c) [of the IAD] is inapplicable.").

Heflin stated that "it is irrational to extend the application of Criminal Rule 4(B) to a defendant who is incarcerated in another jurisdiction." Id. at 124 (citing Smith v. State, 267 Ind. 167, 368 N.E.2d 1154 (1977)). However, the inapplicability of Criminal Rule 4 to defendants in foreign jurisdictions should not extend to defendants who are brought into Indiana under Writs or other forms of temporary custody. This court has determined that defendants in Indiana criminal prosecutions have certain speedy trial rights which we have embodied in Criminal Rule 4. Where the legislature has prescribed an alternate set of time deadlines as part of a broader statutory scheme as it has done in the IAD, we properly subordinate Criminal Rule 4 thereto. But where the state elects not to invoke the IAD for purposes of securing a defendant's presence at trial, it cannot invoke selectively provisions of the IAD that it finds to its liking. Defendant here is entitled to the protections of Criminal Rule 4.

A-2

We now look to see whether the State complied with Crim.R. 4(C) and brought defendant to trial within one year. The one year period begins with the date criminal charges are filed against the defendant or with the arrest of defendant, whichever is later. Crim.R. 4(C). "If a defendant seeks or acquiesces in any delay which results in a later trial date, the time limitations of the rule are also extended by the length of those delays." Isaacs v.

State, 673 N.E.2d 757, 762 (Ind. 1996). See Ferguson v. State, 594 N.E.2d 790, 792 (Ind. 1992).

Defendant was charged in August of 1992, and on October 8, 1992, the Clark Circuit Court granted the first Writ. Defendant was transported to the Clark Circuit Court and arraigned on November 9, 1992.[26] Defendant being brought to Indiana is equivalent to an "arrest" and thus the one year period for determining a violation of Crim.R. 4(C) commences on November 9, 1992.[27] After the court granted defendant's Motion to Quash the Writ, the State dismissed the charges on April 22, 1993. In holding the State responsible for the time elapsed between defendant's "arrest" and the dismissal of the charges, 165 days is charged to the State.

On March 30, 1994 the State refiled the charges against the defendant and was granted the second Writ on August 1, 1994. The defendant was transported to Clark County on August 15, 1994. Dismissing and re-filing charges does not reset the speedy trial clock -- it merely

---

[26]Defendant does not advise us as to when he was transported to Indiana and does not direct our attention to an order contained in the record providing for his transfer. The record does contain defendant's September 19, 1995, Verified Petition for Writ of Mandamus and/or Prohibition requesting this Court to dismiss defendant's case with prejudice which stipulates that defendant was brought to the State of Indiana on November 9, 1992. (R. at 243.) Although we denied defendant's Petition, we presume the facts set forth in the Petition are correct.

[27]We also note that defendant's speedy trial rights in Indiana do not commence until he is within the jurisdiction and exclusive control of Indiana authorities. See text in part III-A-I and Heflin v. State, 275 Ind. 197, 201, 416 N.E.2d 121, 124 (Ind. 1981).

tolls it for the actual days between dismissal and refiling. Hornaday v. State, 639 N.E.2d 303, 307 (Ind. Ct. App. 1994). See Goudy v. State, 689 N.E.2d 686, 691 (Ind. 1997); Young v. State, 521 N.E.2d 671, 673 (Ind. 1988). However, the speedy trial time does not re-commence on the date charges were refiled because, as we stated supra, Crim.R. 4(C) sets forth that the speedy trial clock commences "from the date the criminal charge against [] defendant is filed, or from the date of his arrest on such charge, whichever is later." See Crawford v. State, 669 N.E.2d 141, 145 (Ind. 1996)("defendant's speedy trial rights do not attach until the filing of a formal indictment or information or until actual restraints are imposed by an arrest and holding to answer a criminal charge."); Goudy, 689 N.E.2d at 691 (because defendant was absent from the jurisdiction when charges were refiled, "the speedy trial clock did not begin to run again until defendant was again held in jail in Indiana."). Consequently, for purposes of calculation, the speedy trial clock re-commences on August 15, 1994, the date defendant was returned to Indiana, and not March 30, 1994, the date the charges were re-filed. Again, defendant's transportation to Indiana is the equivalent of an arrest. On September 21, 1994, the defendant filed a motion for a speedy trial and thus trial was set for November 15, 1994.[28] On November 15, 1994, the defendant joined the State in a motion for continuance of the trial. The defendant requested that trial be continued indefinitely until either the Indiana Supreme Court or the Indiana Court of Appeals issued a final opinion on his

---

[28]We note that the court did set trial within 70 days as required by Ind. Crim. Rule 4(B).

interlocutory appeal.[29] Additionally, the defendant stated in this motion that he "withdraws his motion for a speedy trial, waives his right to a speedy trial, and recognizes that any and all delays between the filing of this Motion and the next scheduled trial date following his interlocutory appeal, are attributable to him and not the State of Indiana." (R. at 135-36) We charge the State with 93 days which elapsed between August 15, 1994 (the re-arrest), and November 15, 1994 (joint motion for a continuance), bringing the total expired time to 258 days.

The Court of Appeals refused to accept the interlocutory appeal on February 6, 1995, and the trial date was thereafter set for April 11, 1995.[30] On March 28, 1995, the defendant, along with the State, filed a joint motion seeking to continue the trial indefinitely and attributing the delays to defendant. The trial court granted the motion. The State is not charged with any time between the November 15, 1994, filing of the motion for a continuance and March 28, 1995, because of defendant's concession that all delays would be attributable to him. See Spann v. State, 681 N.E.2d 223, 226 (Ind. Ct. App. 1997)("A defendant is responsible for

---

[29]Defendant appealed the trial court's denial of his motion to quash the second writ. (R. at 135.)

[30]The trial date was set within the 70 days contemplated by Crim. Rule 4(B). Because defendant did not re-assert his desire for a speedy trial, this was not required. See Wheeler v. State, 662 N.E.2d 192, 194 (Ind. Ct. App. 1996)("When a defendant requests an indefinite continuance and later becomes dissatisfied that his trial has not been reset, he must take some affirmative action to notify the court that he now desires to go to trial to reinstate the running of the time period.").

any delay caused by his action including seeking or acquiescing in any continuance.").

On June 6, 1995, the trial court set the jury trial for October 3, 1995. Defendant did not object to this trial date nor did defendant at this time request a speedy trial. On July 14, 1995, the defendant filed a motion to dismiss for a violation of Crim.R. 4(C)(R. at 234) and a hearing was held on this matter on September 11, 1995. The trial court denied the motion to dismiss. Defendant contends that the filing of a motion to dismiss was a request for a speedy trial. We have held before that a motion to dismiss for a violation of the right to a speedy trial is an assertion of a defendant's right. Crawford, 669 N.E.2d at 150 (failure of defendant to timely move to have case dismissed, on grounds that state violated 180 day period provided by IAD for final disposition of charges, waives that right). However, defendant already waived his right to a speedy trial when he failed to object on June 6, 1995, to the trial court's decision to set trial for October. "Once a trial date is set beyond the one-year limit provided for in Crim.Rule 4(C), the defendant must file a timely objection to the trial date or waive his right to a speedy trial." Randall v. State, 455 N.E.2d 916, 922 (Ind. 1983). See Wheeler v. State, 662 N.E.2d 192, 194 (Ind. Ct. App. 1996). Additionally, "when defendant asks for a continuance, the time between the motion for a continuance and new trial date is chargeable to defendant." Henderson v. State, 647 N.E.2d 7, 12-14 (Ind. Ct. App. 1995). See Wheeler, 662 N.E.2d at 194. This would comprise the time which elapsed from March 28, 1995 (joint motion for a continuance), to October 3, 1995 (new trial date). And finally, on September 19, 1995, the defendant filed a motion to stay proceedings and continue

the trial date in order to pursue a Petition for Writ of Mandamus and/or Prohibition.[31] The motion was granted with delays chargeable to defendant. We denied the Petition on October 12, 1995. The trial eventually occurred on November 14, 1995, with defendant being found guilty on November 21, 1995, and being sentenced on December 20, 1995. In totality, the State is charged with causing trial to be delayed by 258 days, which is well within the one year time limitation of Crim.R. 4(C). Consequently, defendant was not denied his statutory right to a speedy trial.

B

We next turn to whether defendant was deprived of his right to a speedy trial under the Indiana and United States Constitution. In reviewing claims of speedy trial rights, Indiana and federal courts apply the analysis established in Barker v. Wingo, 407 U.S. 514 (1972). See Lee v. State, 684 N.E.2d 1143, 1146 (Ind. 1997)(citations omitted). The Barker analysis employs four factors: (1) length of delay, (2) defendant's assertion of his right, (3) the government's reason for the delay, and (4) the prejudice to the defendant. Barker, 407 U.S. at 530.

The defendant was first charged on August of 1992 and eventually brought to trial on November 14, 1995. As stated in Part A-2 supra, the State was charged with delaying the trial for 256 days. Because defendant

---

[31]In the Verified Petition for Writ of Mandamus and/or Prohibition, defendant claimed (1) the anti-shuffling provision of the IAD had been violated and (2) defendant's right to a speedy trial under Indiana Crim. Rule 4(C) had been violated. (R. at 245-46.)

was brought to trial within one year as prescribed by Crim.R. 4(C), the length of the delay was not unreasonable. See Lee, 684 N.E.2d at 1146 (delay not unreasonable since defendant was brought to trial in less than six months as required by Crim.R. 4(A)).

Defendant must assert his right to a speedy trial before claiming a constitutional violation. Our review of the record suggests that defendant did request a speedy trial on several occasions. However, we also recognize that on one occasion defendant waived his right to a speedy trial after filing a joint motion for a continuance and that on several occasions was the protagonist of the delays by engaging in the following actions: (1) filing several other motions for continuances; (2) seeking an interlocutory appeal; and (3) filing a Verified Petition for Mandamus and/or Prohibition. Additionally, when the trial date was set on June 6, 1995 for October 3, 1995, defendant did not object to the trial date nor did defendant at that time request a speedy trial. Defendant's attempts to assert his right to a speedy trial were insufficient.

We do not find that the State unreasonably delayed the trial. As discussed earlier, after the trial court granted the motion to quash the first Writ, the State dismissed the charges against defendant. Thus, a majority of the delay (165 days) that was charged to the State related to the skirmishing over the first Writ. The only other delay charged to the State was 91 days attributable to the time between re-arresting defendant and defendant's motion to continue the trial date. We do not find that the state engaged in any actions with the purpose of delaying trial.

The final factor in the Barker test, prejudice, is assessed in light of the three interests which the right to a speedy trial was designed to protect: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Barker, 407 U.S. at 532. See Lee, 684 N.E.2d at 1146 (citing Scott v. State, 461 N.E.2d at 143; Lahr v. State, 615 N.E.2d 150, 153 (Ind. Ct. App. 1993)). "Indiana courts have placed the burden of demonstrating actual prejudice on the defendant to prove a speedy trial deprivation." Lee, 684 N.E.2d at 1146 (quoting Scott, 461 N.E.2d at 143; Lahr, 615 N.E.2d at 153).

The only prejudice which defendant asserts that he suffered was an impairment of his defense. Defendant contends that he suffered a "presumptive prejudice" as described in Harrell v. State, 614 N.E.2d 959 (Ind. Ct. App. 1993), or at least a palpable prejudice. Br. of Appellant at 17. In Harrell, the Court of Appeals stated that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, "for that matter, identify." Id. at 965. Because we do not find that the delay in bringing defendant to trial was excessive, the Harrell standard of "presumptive prejudice" is not applicable. Additionally, in Harrell the defendant submitted evidence of actual impairment. In this case, defendant merely asserts that he was prejudiced because "evidence sought to be presented with regard to a blue van or other people who might have wanted to kill [the victim] were not able to be produced after the delay caused by the State." Br. of Appellant at 17. Defendant has not provided us with what evidence would have been available but for the delay or by what means the delay

prevented him from presenting this asserted evidence. Consequently, defendant has not proved that his defense was impaired.

As none of the Barker v. Wingo factors point in defendant's favor, we conclude that defendant was not deprived of his right to a speedy trial under either the Sixth Amendment to the United States Constitution or art. I, § 12, of the Indiana Constitution.

IV

Defendant contends that the trial court erred in denying his motion to suppress statements provided by him regarding the location of the victim's body. Defendant presents three reasons supporting his claim: (1) defendant was not advised of his Miranda rights and the State failed to present evidence that defendant waived his Fifth Amendment rights; (2) defendant was provided with use immunity for the statements; and (3) defendant's trial counsel were ineffective for giving him the impression that he had use immunity.

As detailed in Background, supra, defendant was charged with two federal crimes which could have resulted in a sentence of a minimum of 30 years to a maximum of life imprisonment. The federal officials offered defendant a plea agreement whereby they would recommend a sentence reduction if defendant would provide the federal officials with certain kinds of information, the most relevant to this case being the location of Danny Guthrie's body. After this proposal was made, defendant's attorneys telephoned the Clark County prosecutor to advise the prosecutor of the agreement

which had been offered by the federal officials, and asked if the prosecutor would give the defendant "use immunity" for any statements which were provided. What happened next is disputed. Defense counsel testified that, based on the fifteen minute telephone conversation, it was absolutely clear that a use immunity agreement existed. One of the attorneys advised defendant that any statements he made regarding the whereabouts of Guthrie's body could not be used against him in a criminal prosecution. Defendant then provided federal officials and a Clark County detective[32] with his recollection of the events leading up to Guthrie's death. These facts are provided in Background, supra.

A

Defendant contends that because the State failed to advise him of his Miranda rights, the statements he provided regarding the location of the victim's body were inadmissible. The record reflects indisputable evidence that defendant was in federal custody and indeed was not advised of his Miranda rights. However, under the circumstances of this case, we find that it was unnecessary for defendant to be advised of his Miranda rights.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court established several broad prophylactic rights in order to protect citizens interrogated while in custody. See Allen v. State, 686 N.E.2d

---

[32]Detective Kramer observed and listened to defendant's statements via a closed circuit television located in the interrogation room.

760, 769 (Ind. 1997). Miranda requires that defendants be advised of their right to an attorney, their right to remain silent, that their statements may be used against them in a court of law, and that the State will provide them with an attorney if they cannot afford one. Allen, 686 N.E.2d at 769. "The purpose of requiring the Miranda warnings before custodial interrogation is to combat state-sanctioned coercion." Id. However, the warnings required by Miranda are "in the absence of a fully effective equivalent." Miranda, 384 U.S. at 444, 478. See Poulton v. State, 666 N.E.2d 390, 392 (Ind. 1996). In this case, we believe that an equivalent to the advisement of Miranda rights existed. Defendant had two of his lawyers present when he provided the statements which he now wishes to suppress. Irrespective of the fact that the defense attorneys encouraged defendant to provide certain statements to federal authorities to solidify a plea agreement, certainly these attorneys advised defendant of his rights[33] and protected defendant from being coerced by the State. Under these circumstances, we find no error in the State's failure to advise defendant of his Miranda rights.

B

Defendant next contends that even if the Miranda warnings were unnecessary under the circumstances of this case, the statements which defendant provided were inadmissible because they were made under the belief that the State had granted him use immunity. The trial court determined that there was a misunderstanding

---

[33]One of the detectives testified that defendant's attorneys informed at least him that they had advised defendant of his rights. (R. at 715-16.).

between the defense counsel and the State and that in fact no use immunity existed. We agree with the trial court's finding.

Use immunity is a procedural tool utilized by prosecutors to encourage or force reluctant witnesses to testify. Under Ind. Code § 35-37-3-3 (1988), only the prosecutor may request immunity for witnesses in criminal prosecutions and only the trial court may grant such immunity. See Lucas v. State, 499 N.E.2d 1090, 1094 (Ind. 1986).

In Rihl v. State, 413 N.E.2d 1046, 1053 (Ind. Ct. App. 1980), the court looked at three factors in determining whether to enforce an immunity agreement with the State: (1) the involvement of the prosecutor; (2) at least nominal approval by the court; and (3) some detriment to the defendant by the State's failure to abide by its bargain. The record reflects that the prosecutor was involved in discussions relating to the possibility of granting defendant use immunity. However, the prosecutor never definitively articulated that an agreement existed and that defendant would be provided with immunity. During a hearing on defendant's motion to suppress certain statements, defense counsel provided the following testimony in an attempt to explain his belief that use immunity existed:

> " . . . he indicated he would prosecute Mr. Sweeney if he was able to obtain independent information which would justify the prosecution. Now my understanding of that portion of the conversation would have been that we had the use immunity

> agreement . . . He did manifest an interest in prosecuting, but my understanding was it would be on the basis of discovering evidence other than that might come out of a statement from Mr. Sweeney." (R. at 608.)

On the basis of this conversation, defense counsel informed the defendant that he had use immunity for anything he said concerning the Guthrie incident. However, defense counsel did advise the defendant that this agreement was not in writing but that it was clearly his understanding that an agreement existed.[34] We agree with the trial court's finding that the prosecutor's statements do not suggest that he was offering defendant use immunity. The prosecutor was stating just the obvious -- that he would have to discover more evidence to corroborate defendant's statements rather than just solely rely on information provided by defendant. In Indiana, in order for a confession to be introduced at trial, the State must produce corroborating or independent evidence of the corpus delicti.[35] Johnson v. State, 653 N.E.2d 478, 479 (Ind. 1995)(citing Willoughby v. State, 552 N.E.2d 462, 466 (Ind. 1990)).

The record reflects no court approval or supervision of the asserted use immunity agreement. See gener-

---

[34]According to defense counsel, the prosecutor made it clear that they were not interested in pursuing charges relating to the bombing incident and marijuana cultivation or trafficking. (R. at 607.)

[35]See part XI, infra, concluding that the State was able to present independent evidence of corpus delicti.

ally, Everroad v. State, 571 N.E.2d 1240, 1243 (Ind. 1991). Because defendant has failed to prove the first two factors, we find it unnecessary to discuss the third factor -- detriment to defendant. However, a discussion of whether defendant suffered any prejudice is set forth in detail, infra.

C

Defendant finally contends that, if he was not entitled to Miranda advisements and if use immunity was not granted, at least he was denied the effective assistance of counsel. We analyze claims of ineffective assistance of counsel according to the two-part test established in Strickland v. Washington, 466 U.S. 668 (1984). See, e.g., Canaan v. State, 683 N.E.2d 227, 229 (Ind. 1997); Lowery v. State, 640 N.E.2d 1031, 1041 (Ind. 1994). First, defendant must show that, in light of all the circumstances, counsel's performance was outside the wide range of professionally competent assistance. Canaan, 683 N.E.2d at 229 (citing Lowery, 640 N.E.2d at 1041). In order to make such a showing, defendant must demonstrate that counsel's performance was unreasonable under prevailing professional norms. Id. Second, the defendant must show adverse prejudice as a result of the deficient performance. Id. This requires a demonstration that counsel's performance was so prejudicial that it deprived the defendant of a fair trial. Id. There is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Bellmore v. State, 602 N.E.2d 111, 123 (Ind. 1992). An appellant must present strong and convincing evidence to rebut that presumption. Duncan v. State, 514 N.E.2d 1252, 1253 (Ind. 1987).

Defendant's claim of ineffective assistance of counsel is based on the fact that his counsel failed to obtain a writing or recording of the grant of "use immunity." As set forth, supra, Ind. Code § 35-37-3-3 (1988), indicates that a prosecutor must make a request for a witness to be granted use immunity and only the court can grant such a request. The record suggests that this procedure was not followed. However, we acknowledge the possibility that in some counties, familiarity and trust between the prosecutor and defense attorneys is such that at times informal agreements are entered into.[36] Indeed, in this case, the defense attorney testified as follows: "[I] advised [defendant] that we did not have this in writing, but I had talked with the Prosecuting Attorney, it was clearly my understanding that's what the agreement was, ..." (R. at 611.) However common it may be for attorneys to engage in this informal practice of negotiating agreements, we cannot approve extra-judicial "use immunity." In fact, we presume that the legislature's mandate of court supervision for matters relating to "use immunity" and "plea bargaining" was designed to avoid the situation which has arisen here -- a misunderstanding over whether a use immunity agreement exists. For this reason, we assume,

---

[36]See Everroad, 571 N.E.2d at 1243 (where an issue was raised concerning the existence of an immunity agreement and defendant testified that his attorney advised him that "he could trust the prosecutor therefore no written agreement would be needed"); Bowers v. State, 500 N.E.2d 203, 204 (Ind. 1986)(although there was no granting of "use immunity," the State did make an agreement with defendant that if defendant provided certain information the state would forego criminal charges and the Court enforced the agreement for public policy reasons).

without deciding, that counsel was deficient for failing to obtain an agreement in writing.

The "constitutional guarantee of counsel under the Sixth Amendment has been construed to include four rights: the right to counsel, the right to effective assistance of counsel, the right to a preparation period sufficient to ensure a minimal level of quality of counsel, and the right to be represented by counsel of one's own choice." United States v. McCutcheon, 86 F.3d 187, 189 (11th Cir. 1996)(citations omitted). The Sixth Amendment right to counsel attaches when "a prosecution is commenced, that is, 'at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). In United States v. Alvarez, No. 97-4061, 1998 WL 207912 (10th Cir. 1998), the defendant, after meeting with a court-appointed attorney at his request, made several incriminating statements to DEA agents in the hope that he would receive a reduced sentence for his cooperation. After being convicted, the defendant claimed his counsel was ineffective for various reasons. The court determined that defendant had no Sixth Amendment right to effective assistance of counsel at the time he was questioned because the government had not initiated formal proceedings. Additionally, the Supreme Court has determined that the Sixth Amendment right to counsel is "offense specific." McNeil, 501 U.S. at 175. The right "cannot be invoked once for all future prosecutions." Id. "[T]o exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was obtained, simply because other charges were pending at that time, would unnecessarily

frustrate the public's interest in the investigation of criminal activities . . . ." Id. at 175-76 (quoting Maine v. Moulton, 474 U.S. 159, 179-80 (1985)).

In this case, although federal charges had been filed, the State had not yet filed charges for the murder of Guthrie. Consequently, defendant's Sixth Amendment right to counsel and, thus, his right to the effective assistance of counsel had not attached when he provided statements regarding the location of Guthrie's body. See United States v. MacDonald, 966 F.2d 854, 859 n.9 (4th Cir. 1992)(where no Sixth Amendment right to counsel attaches to the proceeding, an ineffective assistance claim cannot be sustained).

V

Defendant contends that the trial court erred when it denied his motion to suppress a handgun obtained through a warrantless search. As described in Background, supra, defendant said he provided this gun to Guthrie and initially buried the gun after finding Guthrie dead. Defendant said he later retrieved the gun for protection. This gun was seized by a Utah police officer. Laboratory testing revealed that defendant's gun was the weapon from which the fatal shot was fired to kill Guthrie. We have reviewed the evidence and affirm the trial court's decision to deny the motion to suppress.

The Fourth Amendment[37] protects persons from unreasonable search and seizure and this protection has

---

[37]The Fourth Amendment to the United States Constitution

been extended to the states through the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 650 (1961). As a general rule, the Fourth Amendment prohibits a warrantless search. Brown v. State, 691 N.E.2d 438, 443 (Ind. 1998)(citing Perry v. State, 638 N.E.2d 1236, 1240 (Ind. 1994); Stallings v. State, 508 N.E.2d 550, 552 (Ind. 1987)). When a search is conducted without a warrant, the State has the burden of proving that an exception to the warrant requirement existed at the time of the search. Id. (citing Stallings, 508 N.E.2d at 552; Short v. State, 443 N.E.2d 298, 303 (Ind. 1982)). See Murrel v. State, 421 N.E.2d 638, 640 (Ind. 1981)(citing United States v. Jeffers, 342 U.S. 48 (1951)("Where a search and seizure is effected without a search warrant, the state bears the burden of proving the search fell within one of the well delineated exceptions to the warrant requirement."). Probable cause and exigent circumstances are recognized exceptions. Robles v. State, 510 N.E.2d 660, 664 (Ind. 1987).

We believe that the circumstances of this case demonstrate that the police officer was well within the bounds of his authority to search and seize defendant's handgun. In support of this finding, we provide the spe-

---

provides the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

cific facts which led up to the seizure as testified to by Officer Barney.[38]

Officer Barney pulled defendant over for making an improper lane change on Interstate 70. While defendant was pulling over, Officer Barney noted that "the driver [defendant] appeared to lean over as though he was putting something under the seat." (R. at 931.) After coming to a complete stop, "defendant jumped out immediately" and came back to the officer. Officer Barney found defendant to be very nervous and shaking. In light of observing defendant place something underneath the seat, Officer Barney also became nervous. In response to questions posed by Officer Barney, the defendant denied having either firearms or narcotics. Defendant did not respond to Officer Barney's request to look in the vehicle. At some point, the defendant opened the trunk of his vehicle, and while rifling through a suitcase said, "see, there's no guns or drugs." (R. at 933.) At this point, Officer Barney observed two loaded handgun clips. As a result, Officer Barney returned to his car and ran a check on defendant's personal history and the vehicle. After learning that defendant had an extensive criminal record, the officer searched defendant's vehicle and found a handgun on the passenger's side of the vehicle in the location where he had earlier observed defendant reaching. Defendant was charged with having a loaded firearm in the vehicle and for being a restricted person in possession of a firearm.

---

[38]Officer Barney is employed by the Servier County Sheriff's Department in the State of Utah where the search and seizure took place.

Officer Barney was justified in stopping defendant's vehicle. See Walker v. State, 527 N.E.2d 706, 708 (Ind. 1988)(stopping defendant's vehicle for taillight and license plate light violations was a justified stop); Taylor v. State, 406 N.E.2d 247, 250 (Ind. 1980)(initial stop of car for traffic violations was lawful). We also find that defendant impliedly consented to a search of his vehicle by opening the trunk of his car. A valid consent to a search obviates the requirement of a warrant. State v. Foreman, 662 N.E.2d 929, 931 (Ind. 1996); Perry v. State, 638 N.E.2d 1236, 1240 (Ind. 1994).

Even assuming, without deciding, that defendant's consent to a search of his trunk was not a consent to a search of his entire vehicle, the facts demonstrate that Officer Barney had valid reasons for searching defendant's vehicle without a warrant. An officer is permitted to search for weapons when "he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." Terry v. Ohio, 392 U.S. 1, 27 (1968). In this case, the officer noticed defendant lean over as though he was placing something under the seat, defendant was nervous and shaking, the officer observed two loaded handgun clips in the trunk, and finally, the officer learned that defendant had an extensive criminal history. The officer's decision to search the vehicle was reasonable. See Walker, 527 N.E.2d at 708 (the officer obtained knowledge of facts which were sufficient to form the basis of probable cause that the defendant was illegally carrying a weapon); State v. Nixon, 593 N.E.2d 1210, 1213 (Ind. Ct. App. 1992)("observations of the movements in the front seat of the car and the white packets, coupled with [officer's] knowledge of the ways

in which drug sales occur from vehicles, provided the probable cause necessary to effectuate a warrantless, but lawful search . . ."); Young v. State, 564 N.E.2d 968, 970 (Ind. Ct. App. 1991)(pat down search of defendant was reasonable where officer was aware that defendant had a prior arrest for possession of a sawed-off shotgun and the search was motivated by safety concerns); Collett v. State, 167 Ind. App. 185, 338 N.E.2d 286 (1975) (officer's previous information that defendant carried a gun sufficient to justify pat down search). We affirm the trial court's denial of the motion to suppress the handgun.

VI

Defendant claims that the trial court erred in quashing his subpoena duces tecum[39] directing Dr. Handy, a pathologist who performed the autopsy on the victim, to produce "all documentation, notes, articles, etc. of [her] investigation of the epidemiology and manner of death in fatal gunshot wounds in Jefferson [sic] County Kentucky, 1982-1989." (R. at 380.) Defendant claims that the quashing of the subpoena denied him the Sixth Amendment right to cross-examine witnesses.

"The decision to enforce, modify, or quash a subpoena duces tecum is a question for the trial court and will not be disturbed unless the decision is clearly arbitrary." Turpin v. State, 435 N.E.2d 1, 4 (Ind. 1982). See

---

[39]A subpoena duces tecum "may command the person to whom it is directed to produce the books, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith." Ind.Crim.R. 2; Ind. Trial Rule 45(B).

Norris v. State, 516 N.E.2d 1068, 1070 (Ind. 1987)("The trial court has discretion in making decisions regarding discovery matters as a part of its inherent power to guide and control the proceedings."). A court may "quash or modify the subpoena if it is unreasonable and oppressive." Ind.Crim.R. 2(1); Ind. Trial Rule 45(B).

In the hearing on the motion to quash the subpoena duces tecum, the court determined that the subpoena was too broad and not relevant to this case. Additionally, the court advised defendant that "if [the witness] testifies you'll have the right to cross examine her as to her methodology and how she arrives at certain opinions and conclusions and so on and so forth." Defendant has presented us with no reason why the unavailability of Dr. Handy's research prevented defendant from effectively cross-examining her. As such, we find the trial court's decision to quash the subpoena duces tecum to have been reasonable. See Small v. State, 632 N.E.2d 779, 786 (Ind. Ct. App. 1994)(when the defendant issued a subpoena duces tecum directing the police department to produce "all records and information contained by the [police department] concerning arrests, stops, inquiries, searches of defendant's home, car(s), and any other police encounters concerning [defendant]," the Court of Appeals determined that it was reasonable for the trial court to conclude that defendant's subpoena duces tecum was unreasonable and oppressive).

VII

Defendant contends that the trial court erred in denying him credit time for pretrial detention. As discussed supra, defendant was serving a federal sentence

when he was brought to Indiana to face pending criminal charges. On two separate occasions, defendant was detained in the Clark County Jail before being convicted for the crime of Murder. The trial court determined that because defendant was incarcerated for some other crime by some other court, he was not entitled to credit for the time served in Indiana. We affirm the trial court's decision.

Ind. Code § 35-50-6-3 (1988)[40] establishes the credit time that may be earned by a defendant. There are two criteria to consider in determining whether a defendant has a right to pretrial credit: (1) pretrial confinement (2) which was a result of the criminal charge for which sentence is now imposed. Cohen v. State, 560 N.E.2d 1246, 1249 (Ind. 1990).[41] Id.

The facts of this case are substantially similar to the facts in Smith v. State, 330 N.E.2d 384, 388 (Ind. Ct. App. 1975). After being released on bail from state charges, defendant Smith was convicted for another crime

---

[40]Ind. Code § 35-50-6-3 (a) (1988) provides:

> A person assigned to Class I earns one (1) day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing.

[41]We note that "[w]hen multistate charges have been filed against [a defendant], he has the burden on appellate review to establish that his out-of-state confinement was a direct result of the criminal charges which were also filed against him by another state." Cohen v. State, 560 N.E.2d 1246, 1249 (Ind. 1990). Defendant is not entitled to any pre-trial credit for the time he was in federal custody. Defendant was in federal custody as a result of federal charges and not because of charges pending in Indiana.

and incarcerated in federal prison. The State of Indiana, pursuant to a Writ, obtained temporary custody of Smith from federal authorities. Smith argued that he should receive credit time for the period after Indiana assumed jurisdiction over him. The Court of Appeals denied pre-trial credit time because Smith's incarceration "was occasioned by his conviction in federal court, and not by reason of the charges in the case at bar." Smith, 330 N.E.2d at 388. Additionally, the court noted that the trial court's custody of defendant "was with the permission and on behalf of federal officials." Id. Similarly, defendant in this case was incarcerated as a result of his federal conviction and not due to the charges filed by the State of Indiana. For the same reason, we find that defendant should be denied pre-trial credit time.

VIII

Defendant contends that the trial court erred by using an improper factor to enhance his sentence and for failing to articulate the reasons for imposing consecutive sentences. The trial court sentenced defendant to the presumptive term of 40 years and added an additional 20 years for aggravating circumstances. Also, the Indiana sentence was ordered to be served consecutive to the federal sentence. We affirm the trial court's sentencing decision.

A

Ind. Code § 35-38-1-7.1(b)(4) (1990) permits courts to consider whether the "imposition of a reduced sentence or suspension of a sentence and non-aggravation of the sentence would depreciate the seriousness of the

crime," as an aggravating factor when determining the proper sentence to be imposed. However, we have stated on numerous occasions that this factor "may be used only when considering the imposition of a sentence of shorter duration than the presumptive sentence." Mitchem v. State, 685 N.E.2d 671, 679 (Ind. 1997)(quoting Jones, 675 N.E.2d at 1088; Gregory-Bey v. State, 669 N.E.2d 154, 159 (Ind. 1996)(quoting Ector v. State, 639 N.E.2d 1014, 1015 (Ind. 1994)). This factor may not be used, as it appears to have been here, as the basis for enhancing a sentence. Because there is nothing in the record to indicate that the trial court was considering a reduced sentence, the use of this aggravating factor was inappropriate.

Nevertheless, we find the enhanced sentence to be reasonable in light of the other aggravating factors that the trial court identified. See Widener v. State, 659 N.E.2d 529, 533, (Ind. 1995)("The improper use of the 'depreciate seriousness' aggravating circumstance will not necessarily invalidate a sentence enhancement where other valid aggravating circumstances are found. Ector v. State, 639 N.E.2d 1014, 1026 (Ind. 1994)"). The court justified the enhanced sentence with the following other aggravating factors: (1) defendant's criminal history; (2) the cruelty perpetuated by defendant upon the Guthrie family by having information which he did not reveal for a long period of time; and (3) the victim's physical condition at the time of the murder. We find all of these factors which the court considered to be proper under Ind. Code § 35-38-1-7.1(b)(Supp. 1990). The court specifically found no mitigating circumstances to exist.

B

Defendant also contends that since the trial court did not articulate any reasons for consecutive sentencing, the matter should be remanded to the court for an appropriate explanation. Br. of Appellant at 30. While we agree that the trial court gave no explanation for its imposition of consecutive sentences, we do not believe an explanation was necessary due to the circumstances of this case.

It is not contrary to law for a defendant's State sentence to commence after the service of his Federal sentence. Ridley v. State, 690 N.E.2d 177, 182 (Ind. 1997); Shropshire v. State, 501 N.E.2d 445, 446 (Ind. 1986). "[I]t is established law that there is no right to serve concurrent sentences for different crimes in the absence of a statute so providing, and that concurrent sentences may be ordered only when they are to be served at the same institution." Id. (quoting Smith v. State, 165 Ind. App. 37, 330 N.E.2d 384 (1975)). See Carrion v. State, 619 N.E.2d 972, 973 (Ind. Ct. App. 1993). Additionally, "a defendant is not even entitled to credit on his Indiana sentence while he is incarcerated in another jurisdiction for a totally different offense." Carrion, 619 N.E.2d at 973 (citations omitted).

At the time that defendant was sentenced, Ind. Code § 35-50-1-2 (1988), was in effect. This statutory provision provides in pertinent part: "(a) . . . the court shall determine whether terms of imprisonment shall be served concurrently or consecutively." We recently determined that this provision is "an express grant of authority to the trial court to impose consecutive sen-

tences" and noted that this section has been "held to include the authority to impose a sentence consecutive to that of another jurisdiction." Ridley v. State, 690 N.E.2d 177, 182 (Ind. 1997)(citing Penick v. State, 659 N.E.2d 484, 489 (Ind. 1995); Carrion, 619 N.E.2d at 973). See Morrow v. State, 690 N.E.2d 183, 184 (Ind. 1997). The trial court was authorized to order the defendant's Indiana sentence to be served consecutive with his federal sentence.

IX

Defendant contends that the trial court erred by not allowing testimony of the complete statement given by defendant to federal authorities. Defendant contends that the court should have permitted him to introduce "evidence that Guthrie owed money to some cocaine dealers and that there was some indication that Guthrie may have been being followed by a blue van [which allegedly belongs to the cocaine dealers]." Br. of Appellant at 31. In other words, defendant seems to suggest that since incriminating portions of his statement were admitted, he was entitled to introduce the exculpatory portions of the statement as well.

Generally, a defendant who does not testify cannot introduce exculpatory statements made outside of court in order to enhance his credibility at trial. See Canaan v. State, 541 N.E.2d 894, 904 (Ind. 1989); Washburn v. State, 499 N.E.2d 264, 268 (Ind. 1986). However, defendant correctly notes that "When one party introduces part of a conversation or document, opposing party is generally entitled to have the entire conversation or entire instrument placed into evidence." McElroy v. State, 553

N.E.2d 835, 839 (Ind. 1990). See Evans v. State, 643 N.E.2d 877, 881 (Ind. 1994). This rule is often referred to as the doctrine of completeness. "The remainder of the statement or document is subject to the general rules of admissibility, however, and any portions found immaterial, irrelevant, or prejudicial must be redacted." Evans, 643 N.E.2d at 881. See Saperito v. State, 490 N.E.2d 274 (Ind. 1986); Ryans v. State, 518 N.E.2d 494, 496 (Ind. Ct. App. 1988). We recently held that the doctrine of completeness applies for even self-serving hearsay statements. McElroy, 553 N.E.2d at 839. "In balancing the potential harm resulting from the introduction of self-serving hearsay against that resulting from the exclusion of relevant portions of prior statements otherwise admitted, we find persuasive the policy expressed in Ind. Trial Rule 43(A): 'In any case, the statute or rule which favors the reception of evidence governs . . . . '" Id. at 839-40. (emphasis added).

The trial judge focused on the words "fairness ought to be considered contemporaneously with it" from Ind.Evid.R. 106[42] and the words "exclusion of relevant portions" from the McElroy case. Consequently, the court ruled "that only those portions of the statement given by [defendant] that are relevant and that relate to the context

---

[42]Indiana Evidence Rule 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require at that time the introduction of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it. (emphasis added).

regarding his discovery of the body of Danny Guthrie will be admitted through the testimony of this police officer." (R. at 1454-55.) The defendant's statements regarding money that defendant contended Guthrie owed to cocaine dealers and the asserted presence of a blue van was not relevant to the discovery of Guthrie's body.[43] As such, we find no error in the trial court's decision to exclude this evidence.

X

Defendant contends that the trial court erred by not allowing testimony of other possible reasons for the death of Guthrie. However, defendant provides us with no citation to the record pertaining to evidence of alternate explanations of Guthrie's death. A party must support its argument with citations to appropriate sections of the record. See Ind. Appellate Rule 8.3(A)(7); Wrinkles v. State, 690 N.E.2d 1156, 1164 (Ind. 1998).

In this argument, defendant also complains that the State performed no tests to exclude the possibility of suicide. We find no merit to this claim since defendant's own expert testified, out of the presence of the jury, to the following:

---

[43]Defendant was provided some latitude in that he was permitted to cross-examine Detective Kramer in order to present defendant's statements that Guthrie was "involved [in] business deals that went bad in connection with saddles and horses and livestock . . . ." and that Guthrie has re-ignited a partnership with defendant in connection with marijuana cultivation. (R. at 1429.)

> My opinion will be to this Jury that this was not a self-inflicted gunshot wound, that there were fragments of metal in this wound and in this cadaver when it was exhumed that are unexplained, and that there was definitely room for procedures to be done to make some determinations in this investigation which were omitted at the time the investigation was done by both investigating officers and the medical examiner's office.

(R. at 1710.)[44]

XI

Defendant contends that the state did not present evidence to establish the corpus delicti for murder. According to defendant, absent his statement, "the State could not even establish that Guthrie was dead, since he was missing and the State had found no body." Br. of Appellant at 34. We disagree.

"A crime may not be proven solely on the basis of a confession." Light v. State, 547 N.E.2d 1073, 1080 (Ind. 1989). There must be some other proof of the crime, "in order to prevent confessions to crimes which never occurred." Id. (citing Smith v. State, 167 Ind. App. 428, 339 N.E.2d 118 (1975)). "In Indiana, to support the introduction of a defendant's confession into evidence,

---

[44]This testimony was actually elicited on cross-examination by the State, but the witness offered similar evidence on direct examination by defendant. (R. at 1707.)

the corpus delicti of the crime must be established by independent evidence of (1) the occurrence of the specific kind of injury and (2) someone's criminal act as the cause of the injury." Stevens v. State, 691 N.E.2d 412, 424-25 (Ind. 1997)(quoting Willoughby v. State, 552 N.E.2d 462, 466 (Ind. 1995)). See Moore v. State, 498 N.E.2d 1, 4 (Ind. 1986); Anthony v. State, 409 N.E.2d 632, 635 (Ind. 1980). "[T]he independent evidence need not be shown beyond a reasonable doubt; rather, the evidence need only provide an inference that a crime was committed." Stevens, 691 N.E.2d at 425 (citing Johnson v. State, 653 N.E.2d 478, 480 (Ind. 1995)). Such inference may be established through circumstantial evidence. See Moore, 498 N.E.2d at 4; Anthony, 409 N.E.2d 632, 635 (Ind. 1980)(citations omitted).

We begin by noting that defendant's statements to federal authorities did not constitute a confession. Indeed, defendant at all times, proclaimed that he was innocent and only admitted to finding Guthrie dead and to having knowledge as to the whereabouts of Guthrie's body. Nevertheless, even without defendant's statements relating to finding Guthrie dead with a gunshot wound to the head, there was a sufficient evidence to establish corpus delicti. The medical examiner testified that Guthrie's death was a result of a gunshot wound to the face. A firearm's expert testified that the bullet which killed Guthrie was fired from the defendant's 9mm gun. The medical examiner also testified that no gunpowder residue was found on the external surface of Guthrie's bones. Although the evidence did not exclude the possibility that Guthrie committed suicide, there was sufficient evidence, both physical and circumstantial, to create a reasonable inference that a crime occurred and thus establish corpus

delicti. "The independent evidence supporting the corpus delicti need not preclude every possible explanation of the circumstances."[45] Stevens, 691 N.E.2d at 425 (quoting Johnson, 653 N.E.2d at 480 n. 4). See Grey v. State, 404 N.E.2d 1348, 1351 (Ind. 1980)("although the circumstances did not exclude the hypothesis that the child had been injured in some other manner," because the lacerations to the child's vagina were consistent with rape, corpus delicti had been established as a result of the reasonable inference created); Light v. State, 547 N.E.2d 1073, 1080 (Ind. 1989)(forensic pathologist's testimony that victim's fatal skull injuries by either a hammer, tire tool, or a large rock adequately established corpus delicti); Harkrader, 553 N.E.2d 1231, 1233-34 (where defendant was convicted of dealing in a controlled substance, the court determined that corpus delicti had been established "Although the evidence does not exclude the hypothesis that [the codefendant] found the pills, stole them, or manufactured them herself, the evidence gives rise to a reasonable inference that someone had delivered the pills to [the codefendant].")

---

[45] A dead body alone is not proof of the corpus delicti in a homicide case; but an identified dead body with marks of violence thereon or surrounding circumstances that would indicate the deceased did not die from natural causes established prima facie that a homicide has been committed and the corpus delicti." Stevens v. State, 691 N.E.2d 412, 425 (Ind. 1997)(quoting Brown v. State, 239 Ind. 184, 154 N.E.2d 720 (1958)).

Conclusion

We affirm defendant's conviction and sentence.

SHEPARD, C.J., and DICKSON, SELBY, and BOEHM, J.J., concur.

APPENDIX B

Ruling of the Clark County, Indiana, Circuit Court, From the Bench, November 10, 1994, And Reiterated, November 22, 1994

November 10, 1994

THE COURT: Let me get to the basic motions, the Motion to Suppress the Statement, the Motion to Dismiss the Information. I'm not about to handicap the State of Indiana for a misunderstanding, and I'm going to call it a misunderstanding, that Defense Counsel might have had in a very brief conversation with the Prosecuting Attorney. Defense Counsel has indicated his recollections of the conversations with Mr. Stewart and it's interesting to me that Mr. McDaniel ticked off three things on the agenda, one was the Federal preemption on the bombing offense and one was use immunity regarding marijuana activity and in both of those instances Mr. Stewart concurs and Mr. McDaniel's only reference on two separate questions put to him as to whether or not the State of Indiana agreed to use immunity was that he believed Stewart indicated that he would proceed to prosecute Guthrie [*sic*] should he get any independent evidence and he put it a different way, that he intended to prosecute if he could develop any other information and it is a rational explanation to this particular Court that you simply cannot prosecute somebody based solely on a confession or an admission, that you need some kind of corroborative evidence, be it the body itself, or be it the piece of tissue, be it anything, and that's a true statement that Mr. Stewart made so there must have been a misunderstanding here. Now for Mr. Sweeney's situation it may be considered to

be a gross misunderstanding but I can see how there could be a misunderstanding and I'm calling it a misunderstanding but I don't have any evidence here before me today to indicate that the State of Indiana granted use immunity to Mr. Guthrie [*sic*] for the information acquired regarding -- or granted to Mr. Sweeney regarding information concerning the location of the body of Mr. Guthrie so on that basis, and let me go on because there were several aspects of the Motion to Suppress that were set forth before me, one, the other was citing Indiana Rule of Evidence 410 saying that in plea negotiations or in a plea hearing we cannot use what the Defendant says against himself where that particular plea agreement is dismissed or is set aside or for whatever reason it might be and we understand that logic. That logic is that we could never reach plea agreements if we brought a Defendant into the Courtroom or started to negotiate with Defense Counsel only to say anything you even suggest to us, even the fact that you're willing to enter a plea, we're going to use against you if you back out. We simply can't do that and that's the purpose of that particular rule. This was not a withdrawal of a plea agreement. This was a technical modification of an agreement with the Federal Government and so Rule 410 does not apply and I'm not going to apply *Miranda*, at least to the extent that the Defense wants me to technically apply it. I know of no particular provisions in the Federal law or in State law that says you have to use those exact words before you're permitted to use an admission of a Defendant or a confession of a Defendant. The whole purpose of *Miranda* is to make certain that that individual is fully aware of his Constitutional Rights. Now it can take a thousand different forms, it doesn't have to technically take *Miranda* as a form but *Miranda* is the one that's acceptable by the

Federal Government and one that is acceptable by the State Government as clearly expressing the Defendant's rights and as clearly relating to the Defendant what those rights are and trying to determine whether or not he understands those rights. That's one way of doing it, that's probably the clearest way of doing it, that's the acceptable way of doing it but in this particular case I had a Defense Counsel tell me that he went to extremes, and I think he used the word extremes or he certainly used the word great lengths in explaining to Mr. Guthrie [*sic*] what use immunity meant and what transactional immunity meant and this went on on several occasions, not just the date of the negotiations with the Feds, this was preceded a number of times and use immunity goes to the very heart and soul of giving statements against your interests and whether or not those statements can be used against you and Mr. Sweeney had two competent attorneys practicing around here for 27 odd years or whatever the amount of years were, underlying the bottom line here, without hearing argument from either side, the Motion to Suppress the Statement is denied. The Motion to Dismiss the Information is denied. [R. 725-731]

November 22, 1994

THE COURT: All right, we will note for the record that this has been a hearing on Defendant's Motion to Suppress the Statement that reopened at the Defendant's request and that the Court has heard this additional testimony. Once again, the Motion to Suppress is denied and we'll deem the denial of this Motion once again as a final, appealable order. [R. 767]

Supreme Court, U.S.
FILED
MAY 25 1999
CLERK

(2)

No. 98-1462

IN THE
Supreme Court Of The United States
October Term, 1998

CHARLES EDWARD SWEENEY, JR.,
Petitioner,
v.
STATE OF INDIANA,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

JEFFREY A. MODISETT
Attorney General of Indiana

JON LARAMORE
Deputy Attorney General
Counsel of Record

A. SCOTT CHINN
Deputy Attorney General

Indiana Government Center South
402 W. Washington Street, Fifth Floor
Indianapolis, IN 46204-2770
Telephone: (317) 233-6582

1388

QUESTIONS PRESENTED

1. Petitioner, after being served with certain federal charges, made statements incriminating under state law as he discussed a plea agreement with federal authorities. He made those statements on advice and in the presence of his counsel, who informed Petitioner of his right against self-incrimination. State authorities prosecuted and ultimately convicted Petitioner in part based on his incriminating statements. Was the presence of counsel under these circumstances an adequate protection for Petitioner's self-incrimination right?

2. Petitioner also was being represented by counsel when he sought immunity from the state for his statements to the federal authorities. The Indiana Supreme Court found it was not the state's intent to give Petitioner use immunity and that there was no immunity agreement under state law. Does Petitioner's alleged belief that such an agreement existed render his incriminating statements involuntary in the face of that state-court finding of fact?

3. A defendant's Sixth Amendment right to "effective" counsel attaches only when the government initiates adversary criminal proceedings against him. When Petitioner made incriminating statements to federal authorities, the state had not charged him with a crime or initiated an adversary judicial proceeding against him. Did Petitioner have a right to effective counsel under the Sixth Amendment with respect to the later-filed state charges when he made those statements to federal authorities?

TABLE OF CONTENTS

Page

Questions Presented.....i

Table of Authorities.....iv

Reasons to Deny the Petition.....1

I. This Court's review of the Indiana Supreme Court's decision would serve no compelling federal interest.....1

II. Petitioner may seek first federal review by Habeas corpus.....2

III. The Indiana Supreme Court resolved Petitioner's claims correctly under this Court's precedents.....3

A. Petitioner's statements leading to his murder conviction were voluntary under *Miranda* because he made them on advice and in the presence of counsel.....3

B. Petitioner has failed to identify a legal justification or compelling reason why this Court should take the extraordinary step of upsetting a factual finding the Indiana Supreme Court made under state law.....4

C. Petitioner had no Sixth Amendment right to effective counsel when he volunteered the information the state used to prosecute him.....7

Conclusion.....9

TABLE OF AUTHORITIES

Cases **Page**

Brady v. United States, 397 U.S. 742 (1970) 4, 6
Bram v. United States, 168 U.S. 532 (1897) 6
Burden v. Zant, 498 U.S. 433 (1991) 5
Davis v. United States, 512 U.S. 452 (1994) 8
Hernandez v. New York, 500 U.S. 352 (1991) 5
Maine v. Moulton, 474 U.S. 159 (1985) 8
Malloy v. Hogan, 378 U.S. 1 (1964) 6
McNeil v. Wisconsin, 501 U.S. 171 (1991) 7, 8
Michigan v. Tucker, 417 U.S. 433 (1974) 3
Miller v. Fenton, 474 U.S. 104 (1985) 5
Miranda v. Arizona, 384 U.S. 436 (1966) 1, 3, 4
Moran v. Burbine, 475 U.S. 412 (1986) 8
Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963) 6
Strickland v. Washington, 466 U.S. 668 (1984) 1, 7
United States v. Gouveia, 467 U.S. 180 (1984) 8
Wainwright v. Torna, 455 U.S. 586 (1982) 7

Federal Statute

28 U.S.C. § 2254 2

State Statute

IND. CODE § 35-37-3-3 6

Supreme Court Rule

SUP. CT. R. 1 ..... 1, 2

REASONS TO DENY THE PETITION

The Court should deny the petition for at least three important reasons. First, Petitioner advances no compelling reason for this Court's review. He asserts merely that the Indiana Supreme Court misapplied properly stated legal rules and misfound facts. Second, Petitioner may bring his claims for first federal review in the lower courts by filing a petition for habeas corpus. Third, the Indiana Supreme Court's decision is correct under this Court's clear precedents.

I. This Court's review of the Indiana Supreme Court's decision would serve no compelling federal interest.

Petitioner does not allege, much less demonstrate, that granting his petition would serve an important federal interest implicating any principle articulated in Rule 10 of this Court's rules. Nor is the state aware of an important federal interest. Petitioner has not alleged that this case involves a novel constitutional question or one about which lower federal and/or state high courts are confused. Neither does Petitioner say the Indiana Supreme Court applied the wrong constitutional standards in his case.

The reasons Petitioner offers in support of his petition are not compelling. Petitioner's first and third reasons are that the Indiana Supreme Court erroneously applied otherwise properly stated constitutional rules governing self-incrimination and ineffective assistance of counsel respectively. *Compare* Pet. at 19-21, 26-29 (alleging violations of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Strickland v. Washington*, 466 U.S. 668 (1984)), *with* Pet. App. at 33a-35a, 38a-41a (Indiana Supreme Court applying *Miranda* and *Strickland* to Petitioner's claims on direct

appeal). Petitioner's second reason necessarily implies that the Indiana Supreme Court erred — as a factual matter under state law — when it found he lacked a statement protecting use-immunity agreement with the state prosecutor. *See* Pet. at 21-25; Pet. App. at 35a-38a. Thus, Petitioner supports his petition solely with reasons this Court disfavors. *See* SUP. CT. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

II. Petitioner may seek first federal review by habeas corpus.

Petitioner's claims do not warrant this Court's discretionary and discriminating certiorari review. No federal court has ever reviewed them, and there is no special need for this Court to consider at this stage issues more properly reviewed in the first instance by the lower federal courts. Petitioner's more appropriate course, should he continue to desire federal review of the state courts' decisions, is to file a timely habeas-corpus petition that complies with 28 U.S.C. § 2254. Federal habeas review is available to Petitioner because he is in custody on a state-court judgment.

III. The Indiana Supreme Court resolved Petitioner's claims correctly under this Court's precedents.

A. Petitioner's statements leading to his murder conviction were voluntary under *Miranda* because he made them on advice and in the presence of counsel.

Petitioner argues the state violated *Miranda v. Arizona*, 384 U.S. 436 (1966), by prosecuting him in part based on statements he made to federal authorities. Specifically, Petitioner argues his statements should be deemed involuntary because he never was warned they might be used against him in a state prosecution. Pet. at 20.

But *Miranda* warnings are not required formalistically on pain of violating the constitution. *See Michigan v. Tucker*, 417 U.S. 433 (1974) (*Miranda* prescribes recommended procedural safeguards "to provide practical reinforcement for the right against compulsory self-incrimination"). Here, Petitioner needed no warnings from federal or state authorities to assure he understood his right against self-incrimination. When he gave the incriminating statements, Petitioner was cooperating voluntarily with federal authorities on the advice and in the presence of counsel. Pet. App. at 35a. Indeed, as Petitioner revealed his knowledge about the murder victim's whereabouts, he was being represented by two attorneys, who told a state officer they had advised Petitioner of his rights. Pet. App. at 35a.

As this Court held in *Miranda*, the presence of counsel provides "the adequate protective device necessary to make the process of police interrogation conform to the

dictates of the privilege [against self-incrimination]." 384 U.S. at 466; *see also Brady v. United States*, 397 U.S. 742, 754 & n.12 (1970) (counsel's presence may counteract police station's potentially coercive atmosphere) (citing *Miranda*, 384 U.S. at 466). Thus, it is of no constitutional moment that the authorities did not provide the warnings that Petitioner's counsel were there to provide.

The *Miranda* analysis does not change merely because a state officer witnessed the federal authorities' questioning via closed-circuit television. Petitioner was volunteering information to federal authorities and pursuing a plea agreement. Even Petitioner does not say those federal officers were not free to share the fruits of his admissions to state authorities at any time.

Nor, finally, is Petitioner's assertion — rejected as a factual matter by the Indiana courts — that he had a use-immunity agreement with the State even relevant to his right against self-incrimination. Neither the existence of such an agreement nor his attorneys' misimpressions about its existence alter the fact that Petitioner made his statements on the advice of counsel and in their presence.

B. Petitioner has failed to identify a legal justification or compelling reason why this Court should take the extraordinary step of upsetting a factual finding the Indiana Supreme Court made under state law.

Petitioner asserts the state violated his right against self-incrimination by prosecuting him based on statements made after a promise of immunity. But Petitioner's theory — as well as the cases he cites to support it — assumes there

was such a promise. To the contrary, the Indiana Supreme Court found the state promised no such immunity and that, at most, Petitioner mistook the state's intentions. Pet. App. at 35a-36a.

It would be extraordinary in this context for the Court in essence to "overturn" the Indiana Supreme Court's finding of fact. *See Hernandez v. New York*, 500 U.S. 352, 366 (1991) (on direct review of state-court judgment, "in the absence of exceptional circumstances, we would defer to state-court factual findings, even when those findings relate to a constitutional issue"); *cf. Miller v. Fenton*, 474 U.S. 104, 113 (1985) ("an issue does not lose its factual character merely because its resolution is dispositive of the ultimate constitutional question"). And there is no good reason for the Court to take such an unusual step. Petitioner argues there was "substantial evidence" that his statements were induced by his lawyers' incorrect belief that a use-immunity agreement existed. But Petitioner's suggested standard is manipulated to require an answer in his favor. Because of the deference owed to the Indiana Supreme Court's fact finding, the proper question is whether that finding — that no use-immunity agreement existed under state law — is so erroneous that it masks a violation of Petitioner's right against self-incrimination. *Hernandez*, 500 U.S. at 366; *cf. Burden v. Zant*, 498 U.S. 433 (1991) (*per curium*) (deferring in habeas review to state court's finding regarding existence of immunity agreement).

The record amply demonstrates the Indiana Supreme Court's finding was reasonable. First, the state prosecutor testified he did not grant Petitioner use-immunity through defense counsel. He merely said he would not prosecute Petitioner if the only evidence he had indicating guilt was Petitioner's own statement. *See* Pet. App. at 37a. Second, it

is undisputed there was no written immunity agreement as required by Indiana statute. *See* IND. CODE § 35-37-3-3 (1998). Third, the immunity agreement Petitioner alleges did not receive at least nominal court approval as Indiana law contemplates. *See* Pet. App. at 36a.

The authority petitioner advances in no way requires a different result. Pet. at 22 (citing *Malloy v. Hogan*, 378 U.S. 1 (1964), and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963)). Those cases merely support the unremarkable proposition that a confession may be deemed coerced, and thus involuntary, where it is induced by a promise of leniency or immunity. They do not hold involuntary all alleged governmental promises of immunity for *represented* suspects. Thus, whatever the source of disagreement over the alleged immunity agreement, Petitioner was represented by counsel, whose presence dissipated "the possibly coercive impact of a promise of leniency." *Brady*, 397 U.S. at 754 (distinguishing *Bram v. United States*, 168 U.S. 532 (1897), where confession was "given by a defendant in custody, alone and unrepresented by counsel").

Nor, finally, is Petitioner's attack on his lawyers' representation with respect to the immunity issue even relevant to the question whether he had an agreement rendering his statements involuntary. For the reasons discussed below, Petitioner had no right to counsel when he made those statements.

C. Petitioner had no Sixth Amendment right to effective counsel when he volunteered the information the state used to prosecute him.

Petitioner claims his counsel were ineffective in not securing a clear and enforceable use-immunity agreement with the state before advising him to make incriminating statements to federal authorities. But the analysis need not even reach the *Strickland v. Washington* test that governs ineffectiveness claims, because Petitioner was not entitled to counsel under the Sixth Amendment at the time he made those statements. *See Wainwright v. Torna*, 455 U.S. 586 (1982) ("Since respondent had no constitutional right to counsel, he could not be deprived of the effective assistance of counsel by his retained counsel's failure[.]").

Petitioner was entitled to know about his Fifth Amendment right against self-incrimination during questioning by federal authorities — and he was aware of it then. His two lawyers were present during that questioning. But as this Court's decision in *McNeil v. Wisconsin* teaches, Petitioner conflates his Fifth Amendment right to have counsel present at a custodial interrogation with his Sixth Amendment right to counsel when adversary judicial proceedings begin. *See* 501 U.S. 171 (1991) (rejecting petitioner's attempt to "combine" Fifth and Sixth Amendment rights to counsel).

"The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel." *Davis v. United States*, 512 U.S. 452, 456-57 (1994)

(citations omitted). *See also United States v. Gouveia*, 467 U.S. 180, 187 (1984) ("our cases have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant"); *id.* at 185 (examples of "formal judicial proceedings" are indictment, information, arraignment, or preliminary hearing). Here, the state had initiated no adversary criminal proceedings against Petitioner when he made his incriminating statements. Petitioner was merely a suspect the state was investigating.

Nor does it matter that Petitioner had *federal* charges pending against him when he made those statements. As the Court stated in *McNeil*, the Sixth Amendment is "offense specific" and "cannot be invoked once for all future prosecutions." 501 U.S. at 175. So the Sixth Amendment's right to assistance of counsel is not implicated by Petitioner's having made incriminating statements with respect to *state* crimes for which he had not been charged. *See id.* at 175-76 (citing *Maine v. Moulton*, 474 U.S. 159, 179-80 (1985), and *Moran v. Burbine*, 475 U.S. 412, 431 (1986)).

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

JEFFREY A. MODISETT
Attorney General of Indiana
JON LARAMORE*
A. SCOTT CHINN
Deputy Attorneys General
Indiana Government Center South
Fifth Floor
402 West Washington Street
Indianapolis, Indiana 46204-2770
(317) 233-6582

Attorneys for Respondent
State of Indiana

* *Counsel of Record*